THE CLARENDON EDITION OF
THE WORKS OF THOMAS HOBBES

THOMAS HOBBES

Writings on Common Law and Hereditary Right

EDITED BY
Alan Cromartie and Quentin Skinner

THE CLARENDON EDITION OF
THE WORKS OF THOMAS HOBBES

VOLUME XI

A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT, OF THE COMMON LAWS OF ENGLAND

QUESTIONS RELATIVE TO HEREDITARY RIGHT

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QUENTIN SKINNER

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Quentin Skinner

CONTENTS

List of Abbreviations viii
List of Illustrations x

A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT, OF THE COMMON LAWS OF ENGLAND
edited by Alan Cromartie

General Introduction xiv
Textual Introduction lxvi
Text 1
Bibliography 147

QUESTIONS RELATIVE TO HEREDITARY RIGHT
edited by Quentin Skinner

Textual Introduction 155
Historical Introduction 159
Text 177
Bibliography 179

Index 181

LIST OF ABBREVIATIONS

Beh.	*Behemoth, the History of the Causes of the Civil-wars of England*, ed. W. Crooke (London, 1682)
Brief Lives	*'Brief Lives', chiefly of Contemporaries, set down by John Aubrey, between the years 1669 & 1696*, ed. Andrew Clark, 2 vols. (Oxford, 1898)
Cropsey	*A Dialogue between a Philosopher and a Student, of the Common Laws of England*, ed. J. Cropsey (Chicago, 1971)
De C.	*De Cive: the Latin Version*, ed. H. Warrender (Oxford, 1983)
De H.	*Elementorum Philosophiae sectio secunda de Homine* (London, 1658)
El.	*The Elements of Law Natural and Politic*, ed. F. Tönnies (London, 1889)
ER	*The English Reports*, ed. The Earl of Halsbury, 178 vols. (London, 1900–32)
EW	*The English Works of Thomas Hobbes of Malmesbury*, ed. W. Molesworth, 11 vols (London, 1839–45)
H	Hobbes
Hist. Narr.	*An Historical Narration concerning Heresie, and the Punishment thereof*, ed. W. Crooke (London, 1682)
HW	*The Clarendon Edition of the Works of Thomas Hobbes* (Oxford, 1983–)
Inst.	Coke, Sir Edward, *The [first/second/third/fourth] part of the Institutes of the Laws of England*, 4 vols. (London, 1628–44)
Lat. Lev.	Hobbes, Thomas, *Leviathan, sive de Materia, Forma, et Potestate Civitatis Ecclesiasticae & Civilis* in *Thomae Hobbes Malmesburiensis Opera Philosophica, quae Latine scripsit, omnia*, 2 vols. (Amsterdam, 1668)

Lev.	Thomas Hobbes, *Leviathan, or the Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill* (London, 1651)
Moral works	Thomas Hobbes, *The Moral and Political Works of Thomas Hobbes of Malmesbury* (London, 1750)
OL	Thomae Hobbes Malmesburiensis, *Opera Philosophica quae Latine Scripsit Omnia*, ed. W. Molesworth, 5 vols. (London, 1839–45)
P/phrase	Paraphrase
Quot.	Quotation
SR	*The Statutes of the Realm*, 9 vols. (London, 1810–22)
Vita	*Thomae Hobbes Angli Malmesburiensis Philosophi Vita,* ed. R. Blackburne (London, 1681)

LIST OF ILLUSTRATIONS

1	Title-page of *Tracts of Thomas Hobb's* (1681)	xxi
2	Portrait of Hobbes at sig. Av.	2
3	Title-page of first edition	3
4	Page 1 of *A Dialogue*	7
5	Page 28 of *A Dialogue*	28

THOMAS HOBBES

A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT, OF THE COMMON LAWS OF ENGLAND

EDITED BY

ALAN CROMARTIE

GENERAL INTRODUCTION

Introduction xiv
First publication, title, and synopsis xvi
  First publication xvi
  Title xx
  Synopsis xxii

Hobbes and common law xxvi
  Contemporary legal theories xxvi
  Hobbes, Coke, and equity xxxii
  Hobbes on unwritten law xxxv

Hobbes and heresy xlv
  English heresy law xlv
  The occasion of Hobbes's fears xlix
  Hobbesian accounts of heresy law liii

Conclusion: the unity of the work lviii
Appendix: *Behemoth* and the *Dialogue* lxii

Introduction

> After the reformation, & Disolution of the Abyes, then the Lawe crepte upp, & att laste grew to bee so numerous, And to such a vaste Body, as itt swelde to bee to bigg, for the kingdome, & hath been no smale meanes to fomente & Continue this late & unfortunate Rebellion.
>
> (William Cavendish, first Earl of Newcastle and dedicatee of *Elements of law*)[1]

A dialogue between a philosopher and a student, of the common laws of England should be an indispensable resource for Hobbesian scholarship. Apart from the short fragment to be found at the end of this volume, it was probably its author's final word about political questions; it certainly gave a coherent account of England's constitutional arrangements and an array of confident pronouncements on subjects from crime, punishment, and war to suicide, the family, and English history. Its primary subject matter, common law, has great historical significance, for the dominance of common law ideas was both a striking feature of seventeenth-century English political culture and one that has been difficult to study. Most of the English then believed that the legitimate powers of their monarch could be defined, in principle, by the professional learning of their judges; but precisely because this assumption was pervasive, it encountered little searching criticism. Its oddity could only be perceived by those—high monarchists and radicals—who found it an obstruction to what they were trying to do. A Restoration treatise on the subject would have an interest whoever wrote it; a *Dialogue* by the absolutist Hobbes is a piece of tremendous good fortune.

But for all the opportunities it might be thought to offer, this late work needs to be approached with caution. To begin with, Hobbes composed it when he was very old; the last event referred to in the text was a parliamentary statute of 1661[2] (when he was 73), and a good case can be made, as we shall see, that it was written about a decade later. Hobbes was a late developer who had composed *Leviathan* (1651) when he was over 60, but some allowance should

[1] Thomas P. Slaughter, *Ideology and Politics on the Eve of Restoration: Newcastle's Advice to Charles II* (Philadelphia, 1984), 24.

[2] Text, 15–16.

be made for dwindling intellectual energies. He seems to have been dissatisfied himself, for though he gave a copy to his publisher William Crooke, he refused to have it published because he thought it 'at the end . . . imperfect'.[3] He may have meant 'imperfect' in the then current sense of 'incomplete', but its abrupt conclusion—suggesting that he broke off composition—was not its only noticeable failing.

There is room for disagreement about the way this text should be regarded—it may be a simplification of previous statements, a revision of his previous theories, or even a straightforward application of a consistent 'system'—but where comparison is possible, it seems less full, less rigorous, and less well-organized than his more famous earlier treatises. As we shall see, one possible explanation of some of these perplexing weaknesses is that its composition was influenced by a distorting motive. Although the work was nominally a treatise 'of the common laws of England', Hobbes showed a noticeable preoccupation with narrower questions of crime and punishment, perhaps because his dominant concern was fear of being burned for heresy.[4]

The primary purpose of this introduction is to lay out the evidence of when, and why, Hobbes wrote the *Dialogue*, but proper treatment of this complex problem involves unpicking the relationship between his 'jurisprudence' and his more practical anxieties. Here the question will be tackled in four stages. The opening section discusses what we know about the circumstances of the work's first publication and gives a brief account of its overall structure. At this point, a problem arises. It seems entirely possible that Hobbes had glued together two different projects by adding a discussion of the law of heresy to an unfinished dialogue 'of laws'. This possibility necessitates considering these projects separately.

The second section leaves aside the heresy material. It treats Hobbes as a writer about the common law and shows how the *Dialogue*'s treatment of the system can be related to the views of his contemporaries and to his broader legal theory. The following section deals with the passages concerned with heresy and argues that comparison with similar passages in other works reveals that the relevant material was written after 1668. The conclusion gives grounds for supposing that the work forms a unified whole by

[3] HW, *Correspondence*, 772.

[4] Richard Tuck, *Hobbes* (Oxford, 1989), 35.

showing that even the theory 'of laws' was probably shaped by his fear of prosecution. When the treatise is approached in isolation, both the *Dialogue*'s date and its purpose are difficult to guess; when it is carefully compared with other texts from the same period, it yields a speculative reconstruction of what he was trying to do.

First publication, title, and synopsis

First publication

The puzzles begin with the question of when and why Hobbes let the work be read, for though it was unprinted till 1681, it was in some sense 'published' at least eight years before. An admirer who invested in a copy of *A supplement to Mr Hobbes his works* (London, 1675), a collection of Hobbesian writings put out by William Crooke, would have discovered Crooke's advertisement for other Hobbesian material, including a manuscript of 'A Dialogue betwixt a Student in the Common laws of *Eng-land*, and a Philosopher'. If this advertisement can be believed, Crooke had copies of at least six manuscripts, including two important works (*Behemoth* and *An historical narration concerning heresie*) that Hobbes had been refused permission to print. Such works appear to have enjoyed some possibility of circulation, no doubt in return for a payment made to Crooke; we know that the *Historical Narration* was consulted by the eccentric young deist Charles Blount (1654–1693) 'by your [Hobbes's] Permission and Mr. *Crook*'s Favour'.[5] There thus seems no reason to doubt that the 'Dialogue' deposited with Crooke was also the work referred to by Hobbes on 18 August 1679, when he told his friend and biographer John Aubrey (1626–1697) that 'The Treatise De Legibus at the end of it is imperfect. I desire Mr. Horne to pardon me that I consent not to his Motion. Nor shall Mr. Crooke himselfe get my consent to print it.'[6]

[5] HW, *Correspondence*, 759. Cf. the undated loan of the Latin prose *Vita* to 'ye Ld Hatton's son' (Bodleian Library, Aubrey MS 9, fo. 27r–27av). Harold Love suggests that Blount was lent the only manuscript that then existed (Love, *Scribal Publication in Seventeenth-century England* (Oxford, 1993), 71). This is plausible; in the letter discussed below, Aubrey implied that *Beh.* existed in only one copy (Bodleian Library, Wood MSS F 39, fo. 196v).

[6] Aubrey 9, fo. 14. The statutory arrangements for licensing printing lapsed earlier in the year; the same letter complains that *Beh.* had recently been printed without his consent.

The earliest indication that we have that the work had acquired this semi-public status is a letter of John Aubrey's, dated 2 February 1673. This crucial piece of evidence implies that the work was recently completed. Aubrey reported to a friend that 'the old gent. (T. Hobbes) is strangely vigorous for his understanding still & every morning walks abroad to meditate.' There follows a paragraph break, but the next line commences with evidence of intellectual vigour: the composition of a legal treatise.

He haz writt a treatise concerning Lawe wch 8 or 9 years since I much importund him to doe & in order to it gave him ye L: ch: Bacons *Maximes of ye Lawe*: now every one will doe him ye Right to acknowledge he is rare for definitions & ye Lawyers building on old fashioned maximes (some right some wrong) must needs fall into severall paralogismes; upon this consideration I was earnest wth him to consider these things; to which he was unwilling, telling me he doubted he should not have dayes enough left to doe it.[7]

This passage should be treated with some care. It tells us that some 'eight or nine years since' (Aubrey elsewhere identifies the date as 1664)[8] Aubrey asked Hobbes to write a work about the legal system; it gives no solid evidence about the dating of the *Dialogue* or about the philosopher's motives. It could mean that Hobbes wrote the *Dialogue* in the mid-1660s, but did not trouble to inform his friend, or that he had composed it in the fairly recent past (perhaps for reasons largely unconnected with Aubrey's initial request); in either case, the letter tells against the significance of Aubrey's intervention.

Aubrey's letter goes on to suggest that Hobbes's treatise had practical political importance. It seems to have been shown to the senior judges, whose duties included the licensing of law-books.[9] The passage immediately following states:

He drives on in this the Ks Prerogative high. Judge Hales (who is no great courtier) haz read it & much mislikes it, and is his Enemy. Judge Vaughan haz read it & much commends it; I have lately desired Dr Lock to get a transcript of it, & I doubt not but this present Ld Chancellor (being much for the Ks Prerogative) will have it printed. & have also ordered to have some copies of his

[7] Bodleian Library, Wood MS F 39, fo. 196v.

[8] *Brief Lives*, I 341.

[9] 14 Car. II c.33 §2 (SR V 429), most recently renewed by 17 Car II c.4 (SR V 577), gave the task of licensing books on common law to one or more of the four senior lawyers (the two Chief Justices, the Chief Baron of the Exchequer, and the Lord Chancellor), or to somebody entrusted with the task by one or more of these four notables.

History of the late times [*Behemoth*] . . . wch the Bishops will not licence . . . 'tis fit there should be more copies then one.[10]

All of these names have some significance, especially when it is grasped that Aubrey was writing at a moment of considerable tension.

In mid-March 1672, Charles had suspended payment on his debts, issued a Declaration of Indulgence (suspending the laws against Catholic and Puritan dissent), and embarked upon a war against the Dutch. The war had not gone well, and the royal Declaration was most unpopular, not least with the judiciary, who pointedly neglected to endorse it.[11] Aubrey's letter was dated on 2 February; a day of reckoning was to be expected on 5 February, when Charles was due to meet his parliament. 'Judge Hales', who was said to dislike the *Dialogue* (and whose hostile 'Reflections' upon its conclusions survive),[12] was Sir Mathew Hale (1609–76), Chief Justice of King's Bench and hero of the constitutionalists; 'Judge Vaughan', who was said to admire it, was Hobbes's close friend Sir John Vaughan (1603–74), who was also, as it happened, Chief Justice of the Court of Common Pleas and therefore the second most senior common law judge. 'Dr Lock', the philosopher Locke (1632–1704), was doctor and adviser to the Earl of Shaftesbury (1621–83), who was Lord Chancellor and a supporter of Charles's toleration policy.

Ten days later, on 12 February, Aubrey composed a letter to John Locke embodying almost exactly the same information:

I was at your lodgeing twice to have kiss't your hands before I came out of Towne—to have recommended a MSS or two (worthy of your perusall) of my old friend Mr Th: Hobbes. One is a Treatise concerning the Lawe, which I importun'd him to undertake about 8 yeares since and then in order thereto presented him with my L. Ch: Bacon's Elements of the Lawe. All men will give the old Gentleman that right as to acknowledge his great felicity in well defining: and all know that the lawyers especially the common [omnium Doctorum genus indoctissimum][13] superstruct on their old fashion'd Axioms, right or wrong; for great practisers have not the leisure to be analytiques. Mr H. seem'd then something doubtfull he should not have dayes enough left

[10] Bodleian Library, Wood MS F 39, fo. 196v.

[11] Ronald Hutton, *Charles II: King of England, Scotland, and Ireland* (Oxford, 1989), 294.

[12] They were printed by William Holdsworth, *A History of English Law*, 7th edn., 14 vols. (London, 1957), vol. V, 500–13. The autograph MS (unknown to Holdsworth) can be found in Lambeth MS 3479.

[13] 'The least learned class of all the learned'. The brackets are Aubrey's.

to goe about such a worke. In this treatise he is highly for the Kings Prerogative: Ch: Just: Hales haz read it, and very much mislikes it; is his enemy and will not license it. Judge Vaughan haz perusd it and very much commends it, but is afrayd to license for feare of giving displeasure . . . I never expect to see it printed, and intended to have a copy, which the bookeseller will let me have for 50s; and God willing I will have one at my returne . . .

. . . I have a conceit that if your Lord sawe it he would like it.[14]

When carefully read, however, this passage casts some doubt on the reliability of Aubrey's testimony. It shows that his previous letter overstated his contact with Shaftesbury's household. It also suggests he knew little about the actual contents of the treatise; scholars have tended to assume that he had read the work, but it is clear he did not own a copy and neither of his letters clearly states that he had had the chance to look at one.

The *Dialogue* certainly differed from the book that Aubrey seems to have expected. The volume he presented to the philosopher, Bacon's *The Elements of the Common Lawes of England* (composed in the mid-1590s; first printed 1630) consists in a succession of brief essays on various unconnected legal maxims. Aubrey appears to have envisaged Hobbes, as someone who was 'rare for definitions', examining those maxims and helping to sort out their contradictions. But the *Dialogue* does not refer to Bacon and shows no interest in Bacon's project of formulating legal principles as a preliminary to law reform.[15] Aubrey must also have been disappointed to find that the work did not refer to the country's political crisis. Though by the standards of most other writers it is 'highly for the King's prerogative', it has normally struck readers as notably conciliatory in tone. It stresses, for example, that Kings should take counsel,[16] that they should avoid unnecessary wars,[17] and that they ought to keep their promises unless necessity compels them not to.[18] The *Dialogue* was indeed less usable by politicians such as Shaftesbury than Bacon's

[14] Locke, *The Correspondence of John Locke*, ed. E. S. De Beer, 8 vols. (Oxford 1976–89), vol. I, 375–6. The passage continues: 'You may there see likewise his History of England from 1640 to 1660 about a quire of paper, which the King haz read and likes extremely, but tells him there is so much truth in it he dares not license for feare of displeasing the Bishops.'

[15] For Bacon's probable intention, see *The Works of Francis Bacon*, ed. J. Spedding, R. L. Ellis, and D. D. Heath, 14 vols. (London, 1857–74), vol. VII, 316.

[16] Text, 21.

[17] Ibid., 16.

[18] Ibid., 20.

much earlier treatise. Bacon considers and defends the royal power to dispense with statutes, the power which made it plausible that Charles had the right to suspend the penal laws;[19] Hobbes does not explicitly mention its existence.

None of this should be taken to imply that Aubrey's account was totally misleading, for there is independent evidence that Hobbes did take an interest in law at around the time he was given the volume of Bacon. A clergyman who visited him in 1664 reported that 'hee is auncient and does not talk so as I expected'. He added what appear to be some notes about the topics they discussed:

> All land hath ye fee simple in some man or else it is in abeyance yt is his expectation:
> Inquire for what somme special bayl is requisite:
> No man taken in [illegible] is baylable. inquire further
> A bodie politique does not cannot committ Treason or performe personal service as a single person may:[20]

These jottings corroborate Aubrey's account, but they are not, unfortunately, conclusive; not one of the points listed was mentioned in the *Dialogue* itself. Though Hobbes no doubt allowed him to believe that he had been the spur to composition, it remains an open question if he was genuinely responsible.

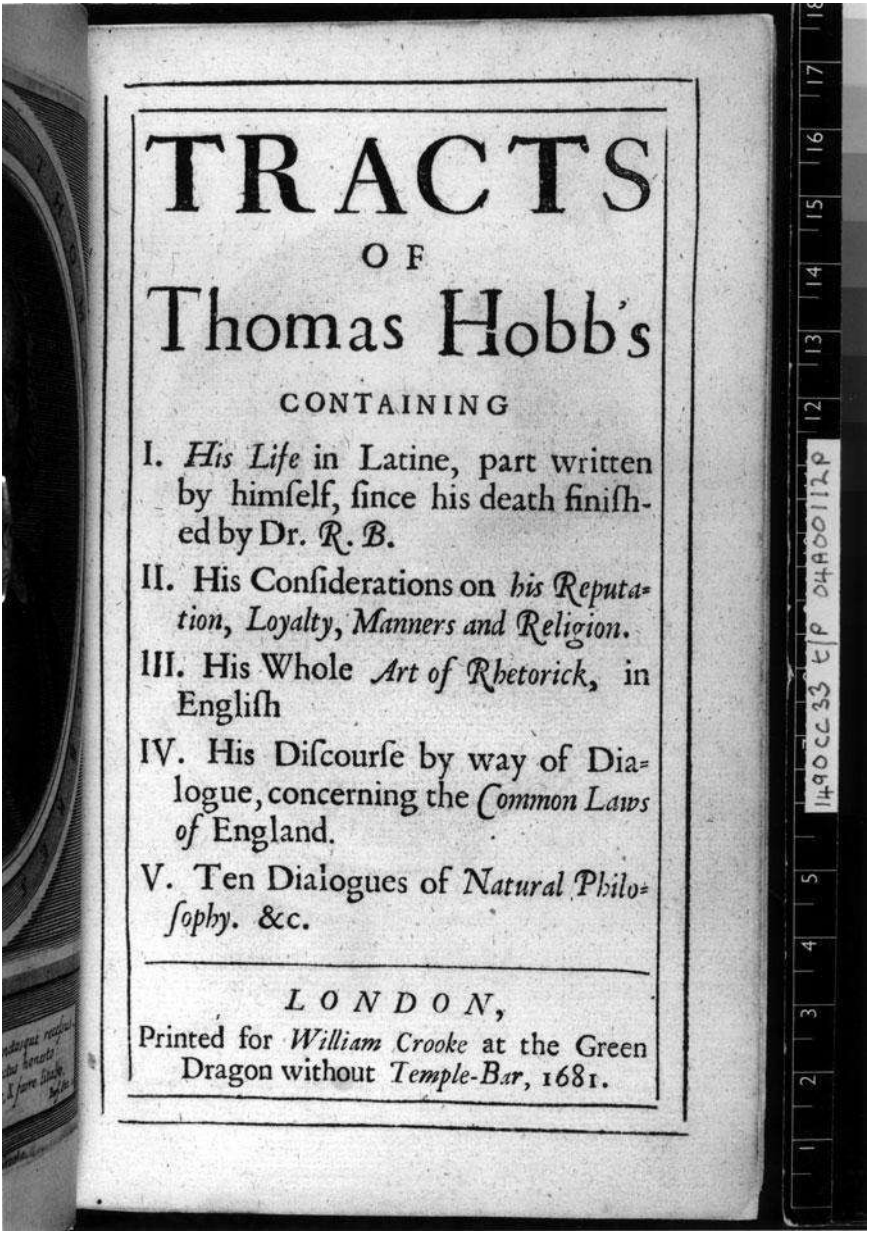
Title

When read in isolation, the text itself adds little to Aubrey's evidence, except to raise some further difficulties. As readers may have noticed, we do not even know its proper title. Hobbes casually spoke of 'my Treatise De Legibus',[21] but Crooke's initial advertisement of 1675 described it as 'A Dialogue betwixt a Student in the Common laws of *Eng-land*, and a Philosopher'. This latter title called to mind an early Tudor work, *A Dialogue betwixt a Doctor of Divinity and a Student of the Common Laws of England* (first Latin edition 1528), by the great common lawyer Christopher St German (?1460–1541). St German's book was a subtle and lucid discussion of the relationship of common law to wider equitable principles. 140 years later, it

[19] Bacon, *Works*, VII, 370.

[20] Folger Shakespeare Library MS V. a. 293, fo. 2r. I am indebted to Dr Noel Malcolm for a transcription of this document.

[21] Thus in Bodleian Library, Aubrey MS 9, fo. 14. The capital D perhaps suggests that the amanuensis believed 'De Legibus' to be a title.



TRACTS
OF
Thomas Hobb's

CONTAINING

I. *His Life* in Latine, part written by himſelf, ſince his death finiſhed by Dr. *R. B.*

II. His Conſiderations on *his Reputation, Loyalty, Manners and Religion.*

III. His Whole *Art of Rhetorick*, in Engliſh

IV. His Diſcourſe by way of Dialogue, concerning the *Common Laws of* England.

V. Ten Dialogues of *Natural Philoſophy.* &c.

LONDON,
Printed for *William Crooke* at the Green Dragon without *Temple-Bar*, 1681.

1490 cc 33 E/P D4800112P

Title-page of *Tracts of Thomas Hobb's* (1681)

was still as close as common lawyers came to what might be called 'jurisprudence', and its three Restoration editions revealed continuing demand for what it had to offer.[22] The Hobbesian *Dialogue* quoted from St German and showed an interest in equity, so there was a quite genuine connection between the treatises. Although the body of the text refers to the 'Student' as 'Lawyer', *A Dialogue between a Philosopher and a Student* was a title Hobbes might easily have chosen.

But if he had actually done so, and if he attached importance to the wording, he failed to impress this fact upon his publisher. The general title page of the first edition speaks of 'The Art of Rhetoric, with a Discourse of the Laws of *England*'. The treatise has no separate title page, and the title traditionally given is found upon p.1: 'A Dialogue between a *Phylosopher* and a *Student*, of the Common-Laws of *England*'.[23] The highly significant comma removes an ambiguity by showing that 'of' means 'concerning'. This may be a compositor's decision, but it was perfectly in line with what we know of Crooke's habitual practice. In bookseller's advertisements produced in the next year he described it as 'A Dialogue betwixt a Student and a Philosopher, about the Common Laws of *England'* and as *A Dialogue betwixt a Student* in the *Common-Laws of England,* and a *Philosopher* in which is set forth the *Errors* in some Practise'.[24] The contents page of *Tracts of Thomas Hobb's* (1681), the volume including the subsequent reissue, lists it as 'His Discourse by way of Dialogue, concerning the *Common Laws of* England'.

Synopsis

Whatever Hobbes actually called it—whether he had intended to make some kind of reference to St German or was content to have it known as a work 'of common laws'—his name for it was notably

[22] Editions were published in 1660, 1668, and 1673 (Wing S312, 316, 317, 317A).

[23] For details of presentation, see Text, 3 and 7. H can hardly have intended the barbarous spelling of 'philosopher'. Like other anomalous spellings, it has been reproduced in this edition, but the authority of a single sheet seems insufficient to affect the title of this work. We cannot be sure that p. 1 was ever intended as a title page and it is noticeable that the word 'philosopher' is more conventionally spelled elsewhere.

[24] At the end, respectively, of *Behemoth* and *Seven philosophical problems* in the British Library copy (Classmark: 714.b.21) of *Tracts of Mr Thomas Hobbs of Malmsbury* (London, 1682).

unhelpful. As a crude measure indicates, neither alternative conveys the real nature of the *Dialogue*. The treatise was divided into either seven or eight unequal sections: 'Of the Law of Reason' (3.4% of its length); 'Of Soveraign Power' (17.5%); Of Courts (20.4%); 'Of Crimes Capital' (18.2%); 'Of Heresie (8.5%); 'Of Praemunire' (7.0%); 'Of Punishments' (16.3%); untitled [probably 'Of Meum and Tuum'][25] (8.7%). As Crooke made little effort with the text, we can be fairly confident that these sub-headings were the author's own,[26] but in any case they give a fair impression of how he had apportioned his attention.

The opening section, 'Of the Law of Reason', discusses the idea that law is 'artificial reason' (artificial comes from *artifex*: a craftsman), that is, that it is reason as understood by trained professional lawyers. Hobbes was happy to admit that law is reason, but much less happy with the claim that the professional lawyer enjoys a privileged access to what is rational. Here, as elsewhere throughout the *Dialogue*, Hobbes took the *Institutes* composed by the jurist and former Chief Justice, Sir Edward Coke (1554–1632), to represent the common law position (from motives which will soon become apparent, he did not refer to Coke's equally famous *Reports*). The four parts of these *Institutes* (published in 1628, 1642, 1644, and 1644 respectively) were widely different in approach and content, the first part being a sprawling commentary on Sir Thomas Littleton's *Tenures*, and the next three being opinionated surveys of the statutes, of criminal law, and of the powers of various jurisdictions. Hobbes nonetheless appears to have resolved to find at least something to say about all four.

At all events, 'Of the Law of Reason' was focused on two passages from the *First Institutes*, one of which states that common law is 'an artificiall perfection of reason';[27] the other maintains 'that Equity is a certain perfect Reason that interpreteth and amendeth the Law written'.[28] In the following section, 'Of Soveraign Power', Hobbes

[25] At Text, 134 the Philosopher remarks 'I have done with Crimes and Punishments, let us come now to the Laws of *Meum* and *Tuum*.'

[26] They seem to have been found in the manuscript copy seen by Sir Mathew Hale; the Chief Justice's 'Reflections' on the text discuss the first two sections under the headings 'Of Laws in Generall and the Law of reason' and 'Of Soveraigne Power'. (William Holdsworth, *A History of English Law*, 7th edn., 14 vols. (London, 1956), vol. V, 500–13).

[27] *First Inst*., 97b.

[28] Ibid., 24b.

offered what amounted to a reading of the English constitution. He argued that a rational legal system must be a Hobbesian system, allowing the King a totally unfettered power to do what he sincerely felt that national security demanded. 'Of Soveraign Power' has little to say about Coke, but most of the rest of the *Dialogue* reverts to commentary. 'Of Courts' discusses passages of the *Fourth Institutes*, Coke's work about the privileges and functions of legal jurisdictions. Hobbes skipped the long treatment of parliament itself, but followed Coke's detailed account of a number of courts, especially the equitable court presided over by the Chancellor. He seemed particularly keen to claim, in the light of the passages quoted in 'Of the Law of Reason', that as the law and equity were really the same thing, the equitable side of Chancery was really a court of appeal from the common law system.

The next four sections ('Of Crimes Capital', 'Of Heresie', 'Of Praemunire', and 'Of Punishments') follow the exposition of the *Third Institutes*, Coke's digest of the principles of English criminal law. Throughout this portion of the *Dialogue*, Hobbes must have had Coke's text in front of him as he dictated to whoever helped him. It has usually been thought significant that he gave heresy so much attention, not just in the section 'Of Heresie' itself, but also in a couple of pages of 'Of Punishments', where he maintained that punishment by burning had been abolished at the start of the reign of King Edward VI. In the untitled section with which the existing *Dialogue* concludes, Hobbes undertook to criticize the 'Laws of *Meum* and *Tuum*'. The appropriate way to do this, he maintained, was to consider the *Second Institutes*, Coke's commentary on the statute book.[29] In the event, however, his argument tailed off after nearly twenty pages of digressions, the last of them on parliamentary history.

The *Dialogue* thus combined a reading of the English constitution, taking its cue from Coke's belief that common law was reason, with a fairly detailed survey of Coke's works, focusing in particular on crime and punishment. It is easy to see why Hobbes might have embarked upon the former project; less easy to see why he should have attempted the latter, unless his purpose were to camouflage his views about the law of heresy. There is, however, a further complication, because it is quite possible that both the passages on heresy

[29] Text, 134.

were only later added to the text.[30] A writer who was strictly following Coke would have discussed the crime between treason and murder;[31] Hobbes took it after murder, disturbing the flow of debate in order to do so. His treatment followed the words 'Let us now come to Crimes not Capital' at the end of the section 'Of Crimes Capital'; the Lawyer was then made to ask 'Shall we pass over the Crime of Heresie, which Sir *Edw. Coke* ranketh before Murder.' The main thread of discussion was later resumed with the words 'let us come now to such Causes Criminal, as are not Capital.'[32] The passage about burning involved a very similar discontinuity. It was found in a more logical position, but at the price of blatant interruption:

> *La*. The Judgement for Felony is—
> *Ph*. Heresie is before Felony in the Catalogue of the Pleas of the Crown.

Almost two pages later, the Lawyer explained that 'The Punishment for Felony is, that the Felon be hang'd', and the debate continued on its way. Unless the clumsiness is a device to draw attention to these passages, it suggests that they were added rather later.[33]

There seem to be two theories that could account for such behaviour. If Hobbes always intended to deal with heresy, but abandoned the work after losing control of its structure, the late insertion of the new material was an attempt to rescue what he could of an abortive project; if he originally meant to write a book about the legal system (without much reference to heresy), he probably put in the additional matter when he discovered that his life was threatened. On either view, he clearly attached some importance to publishing his thoughts on heresy—enough to motivate him to make available a treatise he regarded as 'imperfect'.

The presence of the heresy material thus offers the most likely explanation of the decision (possibly later regretted) to give the original manuscript to Crooke; it does not necessarily explain the writing of a work 'De Legibus'. To address this further question—the question of whether the work as a whole was influenced by his fear of being burned—we need to examine the substance of his theory.

[30] Heresy is also mentioned at Text, 42 and 111–12.

[31] *Third Inst*., 39–43.

[32] Text, 91, 103.

[33] Text, 119, 120. As Philip Milton remarks, 'the joins are very clearly visible' (P. Milton, 'Hobbes, heresy and Lord Arlington', *History of Political Thought* 14 (1993), 544).

Hobbes and common law

Contemporary legal theories

Here a certain amount of background is essential, for to grasp what Hobbes was doing in writing as he did, a reader needs some general conception of what the English meant by common law. There is no particular reason to think that Hobbes himself had truly detailed knowledge of the subject. As intimate adviser to a great landowner, he could hardly have avoided some acquaintance with the law,[34] but nothing in the *Dialogue* gives unambiguous evidence of real erudition; it suggests an intelligent layman with a marked tendency to misremember his smattering of legal principle. No one completely ignorant of law would base an argument upon the legal concept of a warranty;[35] no one accustomed to consulting law books would find it easy to mix up the third and fourth parts of Coke's *Institutes*.[36] Though he had obviously thought hard about the legal system, we need not assume he gave the same attention to every, or any, particular legal doctrine.

One way to sketch the necessary background is to consider what was meant when people used the phrase 'the common law'. St German once helpfully stated that references to common law could bear three different senses: 'the lawe of this realme of Englande dysceyeured [dissevered?] from all other lawes'; 'the kynges courtes of his benche or of the comon place'; and 'such thynges as were law before any statute made in that poynt that is in questyon'.[37] The phrase 'common law' could be used, in other words, to distinguish English law from Roman law, to distinguish the procedures of the two great royal courts from those of every other jurisdiction, and to distinguish the unwritten law from later statutory alterations.

All three of these senses should be borne in mind, but the best place to start is with the second, for the common law of England consisted in rules developed and respected by the judges of King's Bench and Common Pleas. Advocates were inducted into the knowledge of these principles in the course of a long period (a minimum of

[34] We know he was closely involved in his master the third Earl of Devonshire's legal wranglings with his mother (HW, *Correspondence*, 815–16).

[35] Text, 37–8.

[36] Ibid., 72, 83, 85, 86.

[37] St German, *Doctor and Student*, 180.

seven years was usual) of residence and study at one of the four Inns of Court.[38] Down to the civil wars, though not thereafter, this involved participation in learning exercises conducted by established professional lawyers. There was no strict obligation on the judges to follow precedent, but the pronouncements of their predecessors were the object of intense and arduous study; a truly erudite professional was distinguished by his knowledge of the late medieval Year Books, volumes recording *dicta* and passages of legal reasoning (but often not the outcome of the case).

The common lawyers neither had nor needed a fully worked out theory of their activities, but few if any would have disagreed that their unwritten principles were customary and rational in nature: customary in having existed time out of mind; rational in that the wisdom of professional tradition had adapted them to English circumstances. When professionals tried to articulate what actually happened in court, they usually spoke of a concept they called 'reason'. This notion derived from the Year Books, but its continuing usefulness owed much to the way it made sense of recent practice, especially the relationship between the statute book and 'such thynges as were law before any statute made in that poynt that is in questyon'.

The claim that the unwritten law was reason reflected the fact that its rules had a different status from rules invented by a parliament. It is true that the lawyers acknowledged that parliament made law; though they believed that many of the statutes were 'declarations' of existing law, they knew that 'the high court of parliament' was in the modern sense a legislature. But they also maintained that enactments which declared the common law ought to receive a more respectful treatment than laws which changed the legal situation. A statute that extended or confirmed the common law ought to be generously interpreted, while statutes that repealed the common law were to be taken strictly.[39] In consequence, full knowledge of the statutes required some acquaintance with pre-statutory arrangements. The Elizabethan treatise *A discourse upon the exposicion &*

[38] The principal authorities on the Inns are W. R. Prest, *The Inns of Court under Elizabeth I and the Early Stuarts, 1590–1640* (London, 1972) and Prest, *The Rise of the Barristers* (Oxford, 1986).

[39] Edward Hake, *Epieikeia: a Dialogue on Equity in three parts*, ed. D. E. C. Yale (Yale, 1953), 89, 91; 'Sir Christopher Hatton', *A treatise concerning statutes, or acts of parliament: and the exposition thereof* (London, 1677), 76.

understandinge of statutes acknowledged 'the opynion of some . . . that it forcethe not what the commen lawe was, sence it ys certen what the lawe is nowe by estatute', but insisted that 'they shall neither knowe the statute nor expounde it well, but shall, as it were, folowe theire noses & groape at yt in the darke.'[40]

Thus the difference between common law and statutes was not just that the former had not been written down. As the *Discourse* went on to explain,

> those statutes that come in encrese of the commen lawe . . . shall be taken by all equytye, for synce the commen lawe is grounded upon commen reason yt is good reason that that which augmenteth commen reason shulde be augmented.[41]

Conversely, if a statute 'abridged' the common law, 'this statute abridginge commen reason [shall] be taken strycte.'[42] It was perfectly usual, moreover, for remedies at common law to coexist with statutory replacements. A Year Book dictum had maintained that 'where a statute that gives a process is in the affirmative, the party may have this process or the common law process, but it is different where the statute is in the negative . . . he must then have this process and no other.'[43]

These features of existing legal practice encouraged views of common law that emphasized its rationality. In one of the clearest attempts to make such views intelligible to laymen, the judge Sir John Doddridge (d. 1626) explained that

> the Common Law of this Land (which is often stiled in our Bookes by the name of common reason) is deduced from principles evident and knowne, for the decision of such things as are drawne into doubt, and are unknowne.[44]

What common lawyers did was to 'frame Law upon deliberation and debate of reason . . . when present occasion is offered to use the same,

[40] *A Discourse upon the Exposicion & Understandinge of Statutes*, ed. S. E. Thorne (San Marino, Calif., 1942), 141. Thorne seems not to have known that the bulk of this tract had previously been printed as part of a text called 'Instructions, How and in what manner Statutes shall be Expounded'. The material is found at the end (120–64) of *The Office of a Justice of the Peace* (London, 1658 [corrected in BL E1668(2) to 1657]), a work attributed to William Fleetwood (*c.*1525–94).

[41] *Discourse upon statutes,* 143.

[42] Ibid., 159–60.

[43] Quoted by Thorne at *Discourse upon statutes*, 38.

[44] Doddridge, *The English lawyer* (London, 1631), 62.

by a case then falling out and requiring Iudiciall determination';[45] the principles that were their starting point were taken from natural law and national custom.[46] The findings of this cumulative science could be crystallized in general rules called 'maxims', a maxim being 'the foundation of Law, and the conclusion of reason: for reason is the efficient cause thereof, and Law is the effect that floweth therefrom.'[47] Doddridge was simply spelling out the implications of the well-known dictum set down by the reporter Edmund Plowden (1518–85) that 'there are two principal things from whence arguments may be drawn, that is to say, our maxims, and reason, which is the mother of all laws. But maxims are the foundations of the law and the conclusions of reason.'[48] The picture that emerged was of a system steadily growing in sophistication by a process based on natural principles and previous feats of legal reasoning.

The point to notice here is that Doddridge did not see unwritten law as an unchanging corpus of rules derived from custom; English custom formed only a part of common law and customary rules could be corrected by reference to natural principles. His attitude was shared by Henry Finch (d. 1625), who thought that 'positive' laws, 'those laws which every Common-Wealth makes for itself', were the basis of the common law's 'Grounds and Maxims',[49] but who also believed that such maxims should be 'ruled and over-ruled' by natural law.[50] Both writers appear to have thought of legal maxims more as the consequence of reasoning than as its precondition; Finch spoke of equitable principles 'as guiding the Grounds and Maxims of Things, which newly arise', implying that these 'grounds' emerged in the judicial process.[51] The book that Aubrey gave to Hobbes, Sir Francis Bacon's *The Elements of the Common Lawes of England* (1630), was quite compatible with this tradition. Bacon was stating common law in order to reform it, but he nonetheless included many maxims 'gathered and extracted out of the harmony and congruity of cases . . . such as the wisest and deepest sort of Lawyers have in iudgement, and use, though they bee not able many times to express and set them down.'[52]

[45] Ibid., 241. [46] Ibid., 153. [47] Ibid., 152.
[48] 1 Plowden 27 (ER LXXV 44), cited at Doddridge, *English lawyer*, 152.
[49] Henry Finch, *A description of the common laws of England* (London, 1759), 52.
[50] Ibid., 5.
[51] Ibid., 15.
[52] Bacon, *Elements*, sig., B2r.

An influential line of thought thus treated the unwritten law as a blend of natural law and positive custom—and one whose evolution continued to be shaped by an appeal to natural principles. It would be most misleading to imply that any of these writers were expressing an established orthodoxy; it is, however, helpful, for present purposes, to see them as the middle of a spectrum. On one side, they were flanked by those who stressed the system's customary aspect, treating it as a set of rules that the realm as a whole had tacitly accepted. This way of thinking about law, which emphasized its origins in popular consent, offered a way of making sense of non-common law jurisdictions, especially the church courts and the court of Admiralty. All common lawyers were agreed that the legal force of canon law in England derived, in some sense, from acceptance by the English polity. As a Jesuit scathingly put it, '[Sir Edward Coke] runneth every where to this shift, that the Popes Ecclesiastical and Canon laws, being admitted in England, may bee called the Kings ecclesiasticall laws, for that, they are admitted, and allowed by him and his realme.'[53] The works of the learned John Selden (1588–1654), one of the few contemporaries Hobbes certainly admired, repeatedly stressed the need for such reception,[54] and it was not surprising that the *Dialogue* endorsed the same position; Hobbes held that 'the Canons of the Church of *Rome* were no Laws, neither here, nor any where else without the Popes Temporal Dominions, farther than Kings, and States in their several Dominions respectively did make them so.'[55]

Selden regarded every legal system as 'limited law of nature': a rational response to local problems enacted or permitted by a legislating 'state';[56] he would have had no reason to dissent from Hobbes's view that 'The Law of Nature, and the Civill Law, contain each other, and are of equall extent.'[57] His view was unusual, however, in discouraging the claim that common law was wiser than its rivals. Some other lawyers took a subtler tack, agreeing that their system consisted in what people had accepted, while holding that

[53] 'A Catholicke Devyne' [Robert Parsons], *An answere to the fifth part of reports lately set forth by Syr Edward Cooke* (London, 1606), 3.

[54] On Selden, see Alan Cromartie, *Sir Matthew Hale: Law, Religion, and Natural Philosophy* (Cambridge, 1995), 30–41.

[55] Text, 26.

[56] John Selden, *Opera omnia*, ed. D. Wilkins, 3 vols. in 6 (London, 1725), vol. III, col. 1891.

[57] *Lev.*, 138.

its character as custom could be presented as a guarantee that its provisions would be rational. A custom, after all, came into existence because it was convenient to the people; and it could alter to incorporate the lessons of their communal experience. This view was carefully set out in the English-language preface to the *Irish reports* (1615) composed by Sir John Davies (1569–1626).[58] Its tendency was to direct attention to the collective wisdom of the whole community, as opposed to the techniques of the legal profession.

Hobbes mentioned both Selden and Davies,[59] but chose to concentrate his fire on the other extreme of the spectrum: on those who stressed law's rationality almost to the exclusion of its basis in consent. Doddridge referred to those who thought that English common law was so infused with natural principles 'that all the Law of the Realme is the Law of Reason'.[60] Such people had existed in the sixteenth century,[61] but Doddridge's primary reference was probably to his colleague Sir Edward Coke, who borrowed a phrase from Cicero by calling common law 'the perfection of reason' (*ratio perfecta*), the realization of natural law in English circumstances. This reason had nothing to do with common sense (the previously popular statement that law is 'common reason' was noticeably absent from Coke's writings) but was 'to be understood of an artificiall perfection of Reason gotten by long studie, observation and experience . . . for, *Nemo nascitur artifex* [no one is born a craftsman].'[62] The law had been

> by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, (the trial of right and truth) fined and refined, which no one man (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto.[63]

These 'most excellent men' were the judges. In the 'Proeme' to his *Second Institutes*, his commentary on the statute book, Coke contrasted his efforts with those of Roman lawyers:

[58] Properly *Le primer report des cases et matters en ley resolves & adjudges en les courts del Roy en Ireland* (Dublin, 1615).

[59] It is possible he had not read the latter. See Text, 75n 243.

[60] Doddridge, *Lawyer*, 194.

[61] 'Hatton', *Treatise concerning statutes*, 24–5; Alan Cromartie, 'The constitutionalist revolution: the transformation of political culture in early Stuart England', *Past and Present* 163 (1999), 82–3.

[62] *First Inst.*, 97b.

[63] Coke, *Seventh reports*, Calvin's case, 3b (ER LXXVII 381).

the difference then between those glosses and Commentaries, and this which we publish, is, that their glosses and Commentaries are written by Doctors, which be Advocates, and so in a manner private interpretations: And our Expositions or Commentaries upon *Magna Charta*, and other Statutes, are the resolutions of Judges in Courts of Justice in judiciall courses of proceeding.[64]

Coke claimed, in other words, a *public* status as the expositor of English law. As this was arguably to usurp the place reserved for legislative sovereigns, it was not at all surprising that Hobbes found his ideas objectionable.

Hobbes, Coke, and equity

In choosing to direct his fire at Coke, Hobbes was attacking an extreme position. But Coke's account also had features that he could build upon, for he was happy to accept the view that law was reason; at intervals throughout the *Dialogue*, he reverted to '*Sir Edw. Coke*'s Confession'[65] of this equivalence. His principal objection was to the notion that the rational was best identified by common lawyers. Thus his opening section 'Of Reason' quoted Coke:

this [reason] is to be understood of an artificial perfection of Reason gotten by long Study, Observation and Experience, and not of every Mans natural Reason; for *Nemo nascitur Artifex*.[66] This Legal Reason is *summa Ratio*;[67] and therefore if all the Reason that is dispersed into so many several heads were united into one, yet could he not make such a Law as the Law of *England* is, because by many successions of Ages it hath been fined and refined by an infinite number of Grave and Learned Men.[68]

Hobbes rejected this view on two grounds: that the notion of an 'artificial' reason was unintelligible; and that 'It is not Wisdom, but Authority that makes a Law.'[69] The laws of England were 'made by the Kings of *England*, consulting with the Nobility and Commons in *Parliament*, of which not one of twenty was a Learned Lawyer'.[70]

He later conceded, however, that even if such laws were all abolished, 'Equity, and Reason which [are] Laws Divine and Eternal, which oblige all Men at all times, and in all places, would still

[64] *Second Inst.*, Proeme. [65] Text, 86; cf. 11, 18, 91, 117.
[66] 'No one is born a craftsman.' [67] 'The highest Reason.'
[68] Text, 9. [69] Ibid., 10. [70] Ibid.

remain';[71] these latter rules made up the common law. He thought, in fact, there were two laws in England: the written law consisting in the rules the sovereign had expressly willed; and unwritten law, which was the law of nature and which ought to be applied by the relevant judges in cases not yet covered by the former. In Hobbesian terminology, the former type of law was based on 'justice', the virtue of keeping one's contracts, including the state's founding covenant; the latter represented 'equity'. The application of both types of law required an intellectual operation (for even written law gave rise to ambiguities), but neither required any kind of professional training

> for you are to allow to me, as well as to other Men, my pretence to Reason, which is the Common Law (remember this that I may not need again to put you in mind, that Reason is the Common Law) and for Statute Law, seeing it is Printed, and that there be Indexes to point me to every matter contained in them, I think a Man may profit in them very much in two Months.[72]

One implication of the claim that common law was simply natural reason was that there was no functional distinction between common law and equitable courts. This meant that the principal equitable court, the equitable side of Chancery, was not confined to supplementing common law procedures, but was perfectly entitled to act as a court of appeal. Hobbes mischievously suggested that as bishops were 'obliged by their profession to Study Equity', they were well suited to be Chancellor 'as they were most often before the time of *Hen*. 8. and since that time once in the Raign of King *James*'.[73] Here, as Hobbes must have known, he was touching on a very sensitive matter, for Chancery's equitable jurisdiction was recognized as giving scope for the subversion of the rule of law. Though common lawyers practised in the court and though the Chancellor usually cooperated closely with the judges, the jurisdiction's theoretical basis was arguably incompatible with constitutionalist pieties.

It was in principle a 'court of conscience', that is, a court whose main concern was with the application of general moral rules to puzzles created by special circumstances.[74] Its supporters could protest, quite accurately, that its purpose was merely to supplement the law and that its operations were informed by a deep knowledge of the legal system, but in the early Stuart period its existence had made thoughtful men uneasy. As they were well aware, its

[71] Ibid. [72] Ibid., 11. [73] Ibid., 66.

[74] Sir Thomas Smith, *De republica Anglorum*, ed. Mary Dewar (Cambridge, 1982), 93–4.

jurisdiction could be seen as a vessel of monarchical 'absolute' power.[75] In a revealingly defensive statement, King James had once described it as 'the dispenser of the Kings Conscience, following alwayes the intention of Law and Justice; not altering the Law, not making that black which other Courts made white'.[76] As Hobbes's friend John Selden (1588–1654) pointed out, 'Equity is according to ye conscience of him that is Chancellor, and as yt is larger or narrower, soe is equity[.] Tis all one as if they should make ye Standard for the measure we call A foot, to be ye Chancellor's foot.'[77]

In his description of the court in his *Fourth Institutes*, Coke gave an extremely restrictive account of these activities, cast doubt (as it happens, correctly) on their antiquity, and stressed that a Lord Chancellor 'that knew not the common law could never well judge in equity (which is a just correction of Law in some cases)'.[78] He pointedly printed a list of complaints about the conduct of Lord Chancellor Wolsey.[79] Elsewhere in his works, he said little of the role of equity; the definition that Hobbes quotes from the *First Institutes* referred to the quite separate common law concept 'the equity of the statute', a concept that Coke had chosen to define as 'a certain perfect Reason that interpreteth and amendeth the Law written, it self being unwritten, and consisting in nothing else but right Reason'.[80] 'Equity' in this sense was 'perfect [i.e. artificial] reason' applied to statutory interpretation.

Somebody like Coke was unable to show why Chancery was necessary at all, for a law that was 'reason itself', wiser than any man or generation, was surely not in need of supplementing. This underlying tension in his thinking was the intellectual background to an episode alluded to by Hobbes, his quarrel with Chancellor Ellesmere (1540–1617) in 1616. The clash between Ellesmere and Coke was the climax of a complicated story that probably involved a clash of personalities, but the matter that was formally at issue was whether Chancery could hear a suit after a judgment at the

[75] John Cowell, *The interpreter: or booke containing the signification of words* (Cambridge, 1607), s.v. 'Chanceler'; Finch, *Law, or, a discourse thereof* (London, 1627), 238.

[76] James VI & I, *Political writings*, 214.

[77] John Selden, *Table talk of John Selden*, ed. Sir Frederick Pollock, Selden Soc. (London, 1927), s.v. 'Equity'.

[78] *Fourth Inst.*, 79.

[79] Ibid., 89–95.

[80] *First Inst.*, 24b; Text, 9.

common law.[81] Coke thought that such behaviour amounted to the crime of *praemunire*, the crime of those 'which doe sue in any other Court to defeat or impeach the judgments given in the Kings Court'.[82] As the statute that created *praemunire* was clearly designed to discourage appeals to the Pope, Coke's view could not be said to have much merit, but the question was never definitively resolved; as late as 1670, a litigant attempted to revive it, prompting anxiety in the Lord Chief Justice, who knew 'what heats there were betwixt Lord Coke and Lord Ellesmere, which we ought to avoid'.[83]

Hobbes on unwritten law

The nub of the *Dialogue*'s argument, set out in its opening pages, thus exploited a genuine weakness in Coke's position. Coke was after all maintaining that the true basis of the law of England was reason as perceived by common lawyers. But the claim that law was reason was perfectly acceptable to Hobbes, so long as the reason in question was Hobbesian. He must have been encouraged in pursuing this line of attack by knowing it involved no real departures from previous statements of his legal theory.

Though common lawyers ranked behind the presbyterian clergy in Hobbes's private demonology, he was consistent in his fear of them and in his diagnosis of the ultimate source of the mischief. An outline of his later legal theory is found in the last chapter of *Elements of law*, the manuscript pamphlet he wrote in 1640.[84] The aspect of this theory that most concerns us here was the continuing need that he detected for what he referred to as 'unwritten law'. The most important passage is short enough to merit reproduction and full enough to summarize the heart of his position:

> It is not possible [law-makers] should comprehend all cases of controversy that may fall out, nor perhaps any considerable diversity of them; but as time shall instruct them by the rising of new occasions, so are also laws from time to time

[81] J. H. Baker, *The Legal Profession and the Common Law: Historical Essays* (London, 1986), 205–29.

[82] *Third Inst.*, 119.

[83] 1 Modern 61 (ER LXXXVI 731); for the outcome, see 1 Levinz 243 (ER LXXXIII 388).

[84] If *A briefe of the art of rhetorique* (1637) can be used as a source for Hobbbesian opinions, there is one earlier piece of evidence. *A briefe* makes use of the phrase 'unwritten law' as an expression meaning 'equity' (*Art of rhetorique*, 59: EW VI 447).

to be ordained: and in such cases where no special law is made, the law of nature keepeth its place, and the magistrates ought to give sentence according thereunto, that is to say, according to natural reason. The constitutions therefore of the sovereign power, by which the liberty of nature is abridged, are written, because there is no other way to take notice of them; whereas the laws of nature are supposed to be written in men's hearts. Written laws therefore are the constitutions of a commonwealth expressed; and unwritten, are the laws of natural reason.[85]

There were thus two different categories of law applied by the group that Hobbes called 'the magistrates': the 'written' or explicit commands of the sovereign, and the 'unwritten' principles supposed to be available to every human being's natural reason. The following passage revealed by implication that 'the magistrates' need not be the same as the sovereign. The danger Hobbes perceived was that whoever undertook the work of 'giving sentence according to natural reason' in 'cases where no special law is made' might in effect become a legislator through the insidious power of precedent:

Custom of itself maketh no law. Nevertheless when a sentence hath been once given, by them that judge by their natural reason; whether the same be right or wrong, it may attain to the vigour of a law; not because the like sentence hath of custom been given in the like case; but because the sovereign power is supposed tacitly to have approved such sentence for right; and thereby it cometh to be a law, and numbered amongst the written laws of the commonwealth. For if custom were sufficient to introduce a law, then it would be in the power of every one that is deputed to hear a cause, to make his errors laws.[86]

Hobbes thus accepted that 'the magistrates' should act on equitable principles whenever written law was incomplete; but he was anxious to deny that equitable 'sentences' enjoyed a legal status (that is, authority over anyone except the immediate parties to the case) without at least the tacit assent of the sovereign. He went on to repel the closely analogous danger arising from interpretation of the *written* law: 'In like manner, those laws that go under the title of *responsa prudentum*, that is to say, the opinions of lawyers, are not therefore laws, because *responsa prudentum*, but because they are admitted by the sovereign.'[87]

His point is probably best understood by relating it to two more basic theses, both of which Hobbes repeated in all his writings about moral questions, but between which there appears to be

[85] *El.*, II x 10. [86] Ibid. [87] Ibid.

some tension. One is the claim that natural law is very readily accessible, so long as '*a man imagine himself in the place of the party with whom he hath to do'*, and that its dictates have been promulgated to every human being.[88] The other is that 'right reason' requires authoritative definition:

> This common measure, some say, is right reason: with whom I should consent, if there were any such thing to be found or known in *rerum naturâ*. But commonly they that call for right reason to decide any controversy, do mean their own. But this is certain, seeing right reason is not existent, the reason of some man, or men, must supply the place thereof; and that man, or men, is he or they, that have the sovereign power ... and consequently the civil laws are to all subjects the measures of their actions.[89]

Thus in practice, controversies do arise, even on moral questions, presumably in consequence of errors induced by the passions; *Leviathan* was to remark that 'the unwritten Law of Nature' was

> easy to such, as without partiality, and passion, make use of their naturall reason, and therefore leaves the violaters thereof without excuse; yet considering there be very few, perhaps none, that in some cases are not blinded by self love, or some other passion, it is now become of all Laws the most obscure.[90]

Hobbes seems to have believed, in other words, that natural law was accessible enough to justify the punishment of those who offended against it, although he knew that its interpretation in fact occasioned frequent disagreements. He saw a role for equitable judges in dealing with matters not covered by existing written law, so long as their decisions were not mistaken for a *prospective* measure of right and wrong.

De Cive (1642) picked up on the theme by noting in passing that 'ambitione iurisconsultorum factum sit, ut leges non ab authoritate civitatis, sed ab eorum prudentiâ dependere, imperitis videantur';[91] but Hobbes did not expand upon this statement. As he had warned the reader that he would avoid the 'dangerous shores'[92] of national

[88] Ibid., I xvii 9 (H's italics); cf. *El.* II x 7; *De C.*, iii 26, iv 23; *Lev.*, 79, 140; *De H.*, xiv 5.

[89] Ibid., II x 8; cf. *De C.*, ii 1n., iii 31, vi 9; *Lev.*, 18–19; *De H.*, xiii 8.

[90] *Lev.*, 143.

[91] *De C.*, xii 4. H is punning on the word *prudentia*, which means foresight/practical wisdom, but which also suggests jurisprudence: 'by the ambition of legal experts [*jurisconsulti*], it has come about that laws may appear to laymen to depend not on the authority of the state, but on the experts' own *prudentia*'.

[92] 'Litora periculosa' (Ibid., Ep. Ded, 11).

legal systems, his reticence was understandable. He did, however, mention that 'there are two types of civil law: written and unwritten', the distinction being the mode of promulgation. The former was said to require the voice or some other sign of the will of the legislator', while the latter 'needs no promulgation but the voice of nature'.[93] Unwritten law existed to fill the gaps inevitably left by written laws, given the sheer impossibility of drafting rules to meet all situations. [94] Hobbes also mentioned that neither '*responsa prudentum*' nor the opinions of philosophers ought to be counted among written laws without the sovereign's express consent.[95] When he next came to write an English treatise, he would elaborate on all these points.

In *Leviathan* (1651), as in his previous works, Hobbes presented himself as a writer about 'Civill Law in generall ... my designe being not to shew what is Law here, and there; but what is Law.'[96] As might have been expected, though, given his wholly English readership, he made explicit reference to the assertions of the common lawyers. He thought that there existed civil laws 'not written, nor otherwise published', which must be taken to be laws of nature; the marginal heading explained that 'Unwritten Lawes are all of them Lawes of Nature'.[97] Such principles required 'interpretation', which 'consisteth in the application of the Law to the present case',[98] but no particular interpretation was binding on subsequent judges:

> no mans error [about equity] becomes his own Law; nor obliges him to persist in it. Neither (for the same reason) becomes it a Law to other Judges, though sworn to follow it. For though a wrong Sentence given by authority of the Soveraign, if he know and allow it, in such Lawes as are mutable, be a constitution of a new Law, in cases, in which every little circumstance is the same; yet in Lawes immutable, such as are the Lawes of Nature, they are no Lawes to the same, or other Judges, in the like cases for ever after.[99]

Thus if a judge had misapplied a written principle with the implicit approval of the sovereign, the latter was simply deemed to have revised it, but if the same judge erred about a point of equity,

[93] 'Rursus lex *civilis*, pro duplici modo promulgandi, duorum generum est: *Scripta*, & *non scripta*. Per *scriptam* intelligo, eam quae voce sive signo aliquo alio voluntatis legislatoris indiget ut fiat lex ... *Non-scripta* est ea, quae non aliâ indiget promulgatione praeter vocem naturae.' (Ibid., xiv 14).

[94] Ibid. [95] Ibid., xiv 15. [96] *Lev.*, 137.

[97] Ibid., 140 and marg. [98] Ibid., 143. [99] Ibid., 144.

again with the tacit agreement of the sovereign, his error bound only the parties appearing before him.[100]

This theory of unwritten law has some surprising features, but the Hobbesian account of 'written' law (his name for every principle the sovereign had already promulgated) was more what modern readers would expect. 'The Law of Nature excepted, it belongeth', he wrote, 'to the essence of all other Lawes, to be made known ... either by word, or writing, or some other act, known to proceed from the Soveraign Authority.'[101] He recognized that knowledge of such laws depended on conventional procedures; to use *Leviathan*'s terminology, they needed to be 'verified' by knowledge of the 'publique Registers, publique Counsels, publique Ministers, and publique Seals'.[102]

Leviathan thus repeated his previous distinction between the written and unwritten law. It also reproduced the gist of his earlier treatment of custom. Hobbes stressed that 'when long Use obtaineth the authority of a Law, it is not the Length of Time that maketh the Authority, but the Will of the Soveraign signified by his silence, (for Silence is sometimes an argument of Consent).'[103] He feared the way that ignorance encouraged appeals to 'Custome and Example', with the result that people would call an action just 'of the impunity and approbation whereof they can produce an Example, or, (as the Lawyers which onely use this false measure of Justice barbarously call it) a Precedent'.[104] But he was happy to exploit the fact that 'our Lawyers account no Customes Law, but such as are reasonable', so long as 'the Judgement of what is reasonable ... belongeth to him that maketh the Law, which is the Soveraign Assembly, or Monarch'.[105]

He made it quite explicit here that his principal target was Coke:

> That Law can never be against Reason, our Lawyers are agreed; and that not the Letter, (that is, every construction of it,) but that which is according to the Intention of the Legislator, is the Law. And it is true: but the doubt is, of whose Reason it is, that shall be received for Law. It is not meant of any private Reason; for then there would be as much contradiction in the Lawes, as there is in the Schooles; nor yet, (As Sr. *Ed. Coke* makes it,) an *Artificiall perfection of*

[100] Though H seems not to have troubled to spell the point out, the logic of his theory demands that the sovereign's approval be merely implicit; a principle expressly approved by the sovereign would have the status of a written law.

[101] *Lev.*, 141. [102] Ibid., 142. [103] Ibid., 138.
[104] Ibid., 50. [105] Ibid., 138.

Reason, gotten by long study, observation, and experience, (as his was.) For it is possible long study may encrease, and confirm erroneous Sentences: and where men build on false grounds, the more they build, the greater is the ruine: and of those that study, and observe with equall time, and diligence, the reasons and resolutions are, and must remain discordant: and therefore it is not that *Juris prudentia*, or wisedome of subordinate Judges; but the Reason of this our Artificiall Man the Common-Wealth, and his Command, that maketh Law.[106]

It seems, then, that what Hobbes disliked about the common law was the tendency of claims that law was reason to justify judicial legislation. In fairness to the lawyers, it should be pointed out that none of them saw precedent as absolutely binding. At the time that Hobbes was writing, the two most gifted lawyers were polar opposites: the puritan proto-Whig Sir Mathew Hale and the high church royalist Sir Heneage Finch (1621–82). Both nonetheless saw precedent as no more than an 'evidence' of law, which was not to be confused with law itself.[107] When occasion served, Finch offered an analysis that Hobbes would have accepted, pointing out that 'if precedents make law and one Court may make precedents, there's a new way found out to change all our laws and supersede the legislative power.'[108]

Most lawyers would probably also have denied that precedent in equity was binding.[109] In 1670, in a famous Chancery case, *Fry v. Porter*, the leading judges actually considered a Hobbesian assertion of the irrelevance of precedent. Hobbes's great friend Chief Justice Sir John Vaughan had maintained 'with his wonted Assurance . . . I wonder . . . to hear of citing of Presidents in Matters of Equity; for if there be Equity in a Case, that Equity is an Universal Truth, and there can be no President in it.'[110] Vaughan may well have spoken for no one but himself (he was fond of provocative *dicta*), but the answers to his challenge were revealing. Sir Orlando Bridgman (?1606–74) pointed out that precedent could be a guide to the rationale of equitable decisions; that previous judges ought to be supposed to have acted 'upon great Consideration'; and that there

[106] Ibid., 139–40.

[107] Hale, *The History of the Common Law of England*, ed. C. M. Gray (Chicago, 1971), 45; D. E. C. Yale (ed.), *Lord Nottingham's Chancery Cases*, Selden Soc. 73 & 79 (London, 1957–61), 2 vols., vol. II, 939.

[108] Yale, *Nottingham's Chancery Cases*, I xlix.

[109] For a learned survey, see ibid., I xxxvii–cxxiv.

[110] *Reports of cases taken and adjudged in the court of Chancery* (London, 1693), sig.A3r–v.

was a cost attached to the disruption of existing practice. Hale conceded that 'Equity and right Reason in it self is an universal thing', but thought that 'Mens Judgments especially in Politicks or Morals, can seldom be said to amount to Mathematical Decisions.' To be human was to suffer from

> Inclinations (no ways guided by any Interest or Prejudice) which will turn the Scale; there is something of a Mans Temper which will insensibly mingle and slide into his best formed Notions and Designs. I say, such Reflections as these will convince us with what great Reason a Judge in Equity will search into deliberate Resolutions in Cases of the like Nature before him.[111]

But neither of these clever, conventional men denied the force of Vaughan's argument.

The only attack on *Leviathan* composed by a practising lawyer, John Whitehall's *The Leviathan found out* (1679), stressed that the role of precedent was just to offer guidance:

> suppose Mr. *Hobbes* was now to be arraigned for his Book (and that no Pardon had intervened) ... The Judges would look to see the punishment of such a precedent Malefactor, the better to direct themselves in such a Case, and if they could find no such Malefactor (it being impossible as I think) then they would judge what was the Law and punishment due in such a Case: Not that they would condemn Mr. *Hobbes*, could they find a precedent, because of that precedent, but they would first examin whether that precedent was agreeable to the Law of this Nation, and in case it was they would proceed accordingly, and in case it was not, would reject it and judge the Law without it.[112]

But Whitehall's claims, when carefully inspected, tended to justify his enemy. He contested the Hobbesian view that all unwritten law was equity by treating it as largely positive custom ('is any thing more apparent', he exclaimed, 'than that generally Customs are no part of the Law of Nature?'),[113] but in forswearing an appeal to nature, he left himself unable to explain why Hobbes could be legitimately punished. Hobbes could quite reasonably have enquired by what authority the judges acted in deeming a custom to cover an unprecedented case.

[111] *Reports of cases*, A4. The fullest conventional report of this exchange (1 Modern 307–9; ER LXXXVI 902–3) has a virtually identical account of Vaughan's and Bridgman's remarks, but a less adequate version of Hale's position.

[112] John Whitehall, *The Leviathan found out: or the answer to Mr. Hobbes's Leviathan, in that which my Lord of Clarendon hath past over* (London, 1679), 33.

[113] Ibid., 54.

This point was to be relevant both to the *Dialogue*'s theory of the law in general and to its understanding of the law of heresy. But almost as important were chapters xxvii, 'Of CRIMES, EXCUSES, and EXTENUATIONS', and xxviii, 'Of PUNISHMENTS, and REWARDS'. Between them these chapters developed a theory about the rule of law—though it might be better to call it an ethics of the sovereign magistrate. According to chapter xxvii, a state of incurable ignorance was a complete excuse, 'for the Law whereof a man has no means to enforme himself, is not obligatory';[114] it followed, amongst other things, that there could no retrospective laws. But ignorance could not excuse an act in breach of an unwritten law (that is, in breach of natural equity), because such laws were deemed to be familiar to every human being. Hobbes probably later regretted his chosen example that 'if a man come from the *Indies* hither, and perswade men here to receive a new Religion ... he commits a Crime, and may be justly punished for the same ... because he does that which he would not approve in another, namely, that comming from hence, he should endeavour to alter the Religion there.'[115]

It was a further basic principle that ignorance of the penalty was never an excuse. As Hobbes robustly put it, 'Punishment is a known consequence of the violation of the Lawes'; if the appropriate penalty 'be determined already by the Law, he is subject to that; if not, then is he subject to Arbitrary punishment'.[116] This notably harsh teaching was reinforced by the remark that 'it is reason, that he which does Injury, without other limitation than that of his own Will, should suffer punishment without other limitation, than that of his Will whose Law is thereby violated.'[117] But if a penalty had 'been usually inflicted in the like cases', the sovereign was forbidden to augment it, for if his practice was so lenient that rational criminals were not deterred, he had issued an 'invitement' to the crime.[118]

Leviathan chapter xxviii, 'Of PUNISHMENTS, and REWARDS', restated the same principles as implications of a definition. A punishment was said to be 'an Evill inflicted by publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law; to the end that the will of men may thereby the better be disposed to obedience.'

[114] *Lev.*, 156. [115] Ibid., 152. [116] Ibid., 152–3.
[117] Ibid., 153. [118] Ibid.

There were thus four main conditions for calling an 'evil' a proper punishment: the pain must be inflicted by the sovereign or his agents; the law must precede the transgression; the action punished must be 'Judged by publique Authority' to be against the law (a marginal note explained that this involved a 'publique hearing'); and there must be some possibility 'of disposing the Delinquent, or (by his example) other men to obey the Lawes'. All other pains were classified by Hobbes as 'hostile acts'.[119]

These were important safeguards. The third of these conditions was not perhaps as liberal as it sounds ('publique hearing' means a hearing by state authority, not a hearing that happens in public), but it was nonetheless a real constraint upon the government's behaviour. The fourth had two corollaries that we have already encountered. One was that over-lenient pains were in effect encouragements to crime; as it was 'of the nature of Punishment' to have a deterrent effect, an evil outweighed by the profits of the crime was not a punishment at all, but 'rather the Price' of committing the deed in question.[120] The other was that evils in excess of previously stated penalties were to be classified as 'acts of hostility'; an 'unexpected addition' was not a punishment, because it could have had no deterrent effect.[121] A hostile act was quite permissible within the state of nature, where everyone could be presumed to be an enemy; 'punishment' was the privilege of a subject, forgone by someone who rebelled against the commonwealth 'whatsoever penalty hath been formerly ordained for Treason ... For in denying subjection, he denyes such Punishment as by the Law hath been ordained.'[122] Conversely, 'All Punishments of Innocent subjects, be they great or little, are against the Law of Nature.'[123]

The interest of *Leviathan*'s treatment of punishment is that it can be readily compared with the teachings of the later *Dialogue*. The most obvious single parallel was Hobbes's treatment of a principle transcribed from a copy of Coke's *First Institutes*: an innocent man accused of felony, who fled but was later acquitted, should nonetheless forfeit all the goods he had, 'for as to the Forfeiture of them, the Law will admit no proofe against the Presumption in Law, grounded upon his flight'.[124] It is instructive to compare the quality of the two commentaries. *Leviathan* has:

[119] Ibid., 162. [120] Ibid. [121] Ibid., 162–3.
[122] Ibid., 163. [123] Ibid., 165. [124] Ibid., 144

Here you see, *An Innocent Man, Judicially acquitted, notwithstanding his Innocency*, (when no written Law forbad him to fly) after his acquitall, *upon a Presumption in Law*, condemned to lose all the goods he hath. If the Law ground upon his flight a Presumption of the fact, (which was Capitall,) the Sentence ought to have been Capitall: if the Presumption were not of the Fact, for what then ought he to lose his goods? This therefore is no Law of *England*; nor is the condemnation grounded upon a Presumption of Law, but upon the Presumption of the Judges. It is also against Law, to say that no Proofe shall be admitted against a Presumption of Law. For all Judges, Soveraign and subordinate, if they refuse to hear Proofe, refuse to do Justice: for though the Sentence be Just, yet the Judges that condemn without hearing the Proofes offered, are Unjust Judges; and their Presumption is but Prejudice; which no man ought to bring with him to the Seat of Justice, whatsoever precedent judgements, or examples he shall pretend to follow.[125]

The *Dialogue* has:

If "a Man that is Innocent be accus'd of *Felony*, and for fear flieth for the same; albeit that he be judicially acquitted of the *Felony*, yet if it be found that he fled for the same, he shall (notwithstanding his Innocence) forfeit all his Goods and Chattells, Debts and Duties." O unchristian, and abominable Doctrine! which also he in his own words following contradicteth: "For (saith he) as to the forfeiture of them, the Law will admit no proof against the presumption of the Law grounded upon his flight, and so it is in many other cases: But that the general Rule is, *Quod stabitur praesumptioni, donec probetur in contrarium* [That one should stick to the presumption till the contrary be proved], but you see it hath many exceptions." This general Rule contradicts what he said before; for there can be no exceptions to a general Rule in Law, that is not expresly made an exception by some Statute, and to a general Rule of equity there can be no exception at all.[126]

The treatment in *Leviathan* is more precise and less rhetorical. The *Dialogue* scores the verbal point that a general rule admits of no exceptions, but it omits the valuable distinction between factual and legal presumptions. It also omits the insistence that the principle applies to 'all Judges, Soveraign and subordinate' and the careful flank-guarding parenthesis that 'no written law' forbade the man to fly. From a purely analytical perspective, *Leviathan*'s discussion is a careful piece of work; the *Dialogue*'s falls well below its author's previous standards.

A number of further examples suggest a general decline in precision. Thus his earlier works attended to the question of whether a law

[125] Ibid., 144–5. [126] Text, 126–7. I have added inverted commas.

with a penalty attached was really two separate acts of legislation; Hobbes evidently found difficulty deciding if he should distinguish a 'penal or vindicative' law, a law enjoining magistrates to punish malefactors, from the purely 'distributive' law that the penalty was intended to uphold.[127] The *Dialogue* briefly touches on the problem, but only a reader with access to one or other of his previous works would have much sense of its significance. The *Dialogue* makes no reference to the concept of 'verification'. It also says nothing at all of the view that a punishment which is too lenient should be construed as an encouragement; nor of the view that certain harms inflicted by the sovereign are properly described as 'hostile acts'. Most strikingly of all, it never states that punishment should always be prospective. Yet this powerful and elegant idea, a feature of his theory since *Elements of law*, was needed to make sense of the distinction Hobbes produced between a punishment and restitution.[128]

These were subtle and intricate questions, on which a reasonable man might well have changed his mind, but the feature of the *Dialogue* that needs to be explained is his repeated failure to address them at something resembling his previous level of rigour. Even after some allowance has been made for advancing years, declining powers, and growing disinclination to take pains, this failure makes it hard to see the treatise as purely an attempt at 'jurisprudence'. What this suggests is that its composition required the presence of some further motive. To grasp how fear of being burned could in fact have supplied such a motive, we must now turn to the subject of the law of heresy.

Hobbes and heresy

English heresy law

The English law of heresy had had a complicated history and even a brief outline of the facts (as they were known to seventeenth-century scholars) reveals a number of important points that Hobbes had failed to master. Even where they derive from sloppiness, his errors have a certain interest, because they seem to indicate the way that his knowledge developed. But some of his legal 'mistakes' are also

[127] The terminology is *De C.*'s (*De C.* xiv 6–7; cf. *El.*, II x 6; *Lev.*, 148).

[128] Text, 41.

profoundly conceptually revealing, for his failure or refusal to grasp the position as understood by legally-informed contemporaries was intimately related to his theory of law.

The history of the law of heresy could be divided roughly into three. To begin with, there was the common law (pre-statutory) period. This period was not rich in precedents, for apart from a well-known but isolated case in which a deacon had apostatized for love of a Jewess, no English subject died for his opinions before the early fifteenth century. The unfortunate deacon was punished in 1222; Hobbes incorrectly dated the event to 'the time of *William* the Conqueror'.[129] The earliest formal provision for the crime of heresy was a statute said to have been passed in 1382 (5 Richard II st.2 c.5), allowing bishops to imprison suspects; this measure was found in printed statute books, but the Protestant martyrologist John Foxe (1517–87) denied that it had been approved by the Commons.[130]

The only reliable evidence of the pre-statutory situation was the fate of the Lollard martyr, William Sawtre (d. 1401), who was tried by a provincial convocation, then burned by the sheriff of London on the issue of a writ from Chancery *de heretico comburendo*. The *Dialogue* refers to the relevant passage in Sir Anthony Fitzherbert's *La novel Natura Brevium* (1534), the standard reference work on common law writs. In the English translation Hobbes probably used, Fitzherbert's account was unambiguous:

> the person who shall be burnt for Heresie, ought to be first convict thereof by the Bishop, who is his Diocesan where he dwelleth, and abjured thereof, and afterwards, if he Relapse into that Heresie, or any other, and thereof be condemned in the said Diocess; then he shall be sent from the Clergy to the Secular Power, to do with him as it shall please the King, *&c*. And then it seemeth the King, if he will, may pardon him.[131]

Fitzherbert helpfully printed the writ by which Sawtre was burned, noting that 'by that writ it appeareth' that only a provincial convocation was entitled to convict for heresy.

[129] Ibid., 97.

[130] *The Acts and Monuments of John Foxe*, ed G. Townsend, 8 vols. (London, 1843–9), vol. III, 37–9, followed by *Third Inst*., 40.

[131] Fitzherbert, *The new Natura Brevium of the most reverend judge Mr. Anthony Fitzherbert* (London, 1652), 667.

Fitzherbert went on to explain the changes introduced by written law, beginning with the statute of 2 Henry IV c.15,[132] enacted shortly after Sawtre's burning. This statute gave authority to the diocesan to make the sheriff burn the malefactor, thus in effect depriving the King of a veto by rendering a writ unnecessary.[133] A statute of 2 Henry V (st.1 c.7)[134] completed the medieval heresy law by stripping the condemned man of his personal property. These anti-Lollard statutes were the basis of the law till Henry VIII's erratic policies resulted in some detailed tinkering, most notably by the provisions of 25 Henry VIII c.14, which made the writ once more compulsory.

The late medieval 'statutory phase' was ended by 1 Edward VI c.12 (1547), which repealed the legislation so far mentioned, together with 'all and everie other Acte or Actes of parliament concerninge Doctryne and matters of Religion, and all and everie braunche article sentence and matter, paynes and forfaitures conteyned, mentioned or in anny wise declared in anny of the same acts of parliament or Estatutes.'[135] What happened next provided a perfect illustration of the entrenched presumption of the English in favour of pre-statutory arrangements. Far from ensuring heretics were safe, this blanket repeal of statutory provisions simply abolished *statutory* procedures. The Edwardian regime burned a couple of anti-Trinitarian heretics but nobody seems to have raised any legal objection.

Queen Mary revived the anti-Lollard statutes, but not their Henrician successors, thus liberating bishops from the need to get the writ *de heretico comburendo*. Elizabeth again repealed these statutes, returning English law to its Edwardian position; her bishops made use of the writ to burn alive at least half a dozen erring Protestants, most of them 'Anabaptists' (a sixteenth-century umbrella term for various kinds of radical dissent).[136] The only known complaint came from John Foxe, who disapproved of capital punishment as a method of controlling heretics (though he had no objection to lesser penalties). On the first of these occasions, in 1575, he wrote a number of impassioned letters, which argued, amongst other things, that the

[132] SR II 125–8.

[133] This is not to say, however, that the writ was never used (Logan, *Excommunication and the Secular Arm in Medieval England* (Toronto, 1968), 70).

[134] SR II 181–4.

[135] Ibid., IV 19 (1 Edward VI c.12 §2).

[136] The six known cases are listed by John Coffey, *Persecution and Toleration in Protestant England 1558–1689* (Harlow, 2000), 100–1.

repeal of the medieval statutes denied the burnings any legal basis.[137] Foxe's letters are important evidence that it was possible to claim that burnings must be founded upon statute, but he seems to have found no credible legal supporters.

In 1612 there were two final cases, Bartholomew Legate and Edward Wightman: both of them anti-Trinitarians, both of them tried by their diocesans and executed in the usual fashion. The amiable Thomas Fuller's *The Church-History of Britain* (1655) records that this rigorous policy was dropped because of its effect on 'vulgar judgments', who felt compassion for the miscreant's pain and admiration for his stubbornness, 'wherefore King JAMES politickly preferred, that Hereticks hereafter, though condemned, should silently, and privately waste themselves away in the Prison.'[138]

The survival of these savage penalties was seldom much discussed, but it is most unlikely that someone born in 1588 could have grown up completely unaware that heresy was a capital offence. Debate about these burnings, such as it was, concerned the claim that the diocesan was acting *ultra vires* if he conducted such a trial alone; some people appear to have argued, on the basis of the Sawtre precedent, that Convocation had the jurisdiction.[139] Confusingly, Coke's writings lent support to both positions. In the *Third Institutes*, he recorded that a handful of the judges had been consulted about Legate's case; they thought the jurisdiction was the bishop's 'and so it hath been put in ure in all Queen Elizabeth's reign'.[140] But in the rather scrappy private notes that someone published as his *Twelfth reports* (1656), he had revealed his personal belief that jurisdiction properly belonged to Convocation.[141]

Hobbes did not know or did not care about the existence of the *Twelfth reports*; he may of course have thought of Convocation as more of a threat to his safety than his diocesan. Nor did any of his writings ever mention that only relapsed or obstinate offenders were liable to punishment by burning. He did, however, show great

[137] See Appendices 10, 11, and 13 to Townsend's 'Life and Defence' printed in vol. I of *Acts and Monuments*.

[138] Thomas Fuller, *The church-history of Britain* (London, 1655), Book X, 64.

[139] A position referred to but rejected by Richard Cosin, *An apologie: of, and for sundrie proceedings by jurisdiction ecclesiastical, of late times by some challenged, and also diverly by some impugned* (London, 1591), 48.

[140] *Third Inst.*, 40.

[141] Coke, *Twelfth reports*, 56–8 (ER LXXVII 1335–7).

interest in the provisions of 1 Elizabeth c.1 §8 (1559), which empowered a mixed lay/clerical group, the court of High Commission, to exercise the Queen's ecclesiastical jurisdiction, including the power to deal with 'Errours, Heresies, Scismes, Abuses, Offences, Contemptes, and Enormities'.[142] This statute had further provided that only a statement opposed to the plain sense of Scripture or the canons of the first four general councils could be declared to be heretical; nothing else could be defined as heresy except 'such as hereafter shall bee ordredd, judged or determined to bee Heresye by the Highe Courte of Parlyament of this Realme with thassent of the Clergie in their Convocacion'.[143] But as Coke pointed out, this limitation on the High Commission was not necessarily binding on lesser but concurrent jurisdictions, though he believed that 'it may serve for a good direction to others, especially to the Diocesan, being a sole Judge in so weighty a cause'.[144]

High Commission was abolished in 1641.[145] An explanatory act of 1661 confirmed the abolition, while safeguarding the 'ordinary' powers enjoyed by diocesan bishops.[146] In the absence of relevant statutes, the legal situation that Hobbes faced was thus essentially the same as that which obtained in the reign of Edward VI or during the high Middle Ages. A persecuting prelate would have secured his excommunication (perhaps for non-appearance), before applying for the writ *de excommunicato capiendo*, which could in theory result in an indefinite imprisonment. This was a much more likely fate than actual execution. Under such circumstances, there can be very little doubt that Hobbes would have recanted, but if he were convicted of relapsing, the bishop would have been allowed to apply for the writ *de heretico comburendo*. Given cooperation from the lay authorities, there was no legal obstacle to truly sanguinary persecution.

The occasion of Hobbes's fears

Hobbes's fears were no doubt much exaggerated; a man who believed in the duty of disclaiming his private opinions whenever the authorities requested would have been very hard to persecute. But the state of the law was undoubtedly alarming to anyone who worried about the theoretical position. To reconstruct Hobbes's response to the threat to his safety, we need to establish when and why he seems to

[142] SR IV 352. [143] 1 Eliz. c.1 §20 (SR IV 354). [144] *Third Inst.*, 40.
[145] 16 Car. I c.11 (SR V 112–13). [146] 13 Car. II c.12 §1 (SR V 315).

have felt threatened. So far as we know, there were three episodes that might have stimulated him to write about the subject. Our knowledge of the first depends on evidence provided by John Aubrey. In a note that he must have composed in 1674 or earlier, Aubrey said that 'about the time of the King's returne' Hobbes had been 'makeing of a very good poeme in Latin hexameters ... the history of the encroachment of the clergie (both Roman and Reformed) on the civill power', of which Aubrey 'sawe at least 300 verses (they were mark't)'.[147] This was probably part of the poem that became *Historia ecclesiastica*, a work that appears to have reached its final form more than a decade later.[148] The importance of this piece of testimony lies in the additional statement Aubrey attached to it: 'At what time there was a report the bishops would have him burn't for a heretique. So he then feared the search of his papers and burned the greatest part of these verses.'[149]

The existence of this rumour is not in itself particularly surprising; nothing could be more likely than that 'some of the bishops' had this aspiration, or at least were reported to do so, and it was only prudent to respond by weeding out incriminating papers. But Aubrey's *Life* of Hobbes supplies a rather different version:

> There was a report (and surely true) that in parliament, not long after the king was setled, some of the bishops made a motion to have the good old gentleman burn't for a heretique. Which he hearing, feared that his papers might be search't by their order, and he told me he had burn't part of them.[150]

This tells us that Hobbes himself was Aubrey's source, but it adds a claim that nobody has yet succeeded in corroborating: that Hobbes had been attacked in parliament. The episcopal initiative has left no trace in the official *Journals*, so it cannot have been literally a 'motion'.

[147] *Brief Lives*, I 394; cf. I 338.

[148] It is mentioned in the prose *Life* just after *Behemoth* (*Vita*, 17: OL I xx). His amanuensis Wheldon's detailed account book (Hardwick MS 19) records a payment of £1 'for writing a booke, Historia Ecclesiastica Romana' in the period 'September and October' 1671. Hobbes made frequent small payments to Wheldon, but this was the only Hobbesian work that the account book ever specifically mentioned.

[149] *Brief Lives*, I 394. For details, including the date, see Milton, 'Hobbes, Arlington and heresy', 510.

[150] *Brief Lives*, I 339.

The blame for this confusion appears to lie with the philosopher. Aubrey probably derived his information (which he kept reminding himself to verify)[151] from a work Hobbes attempted to publish in June 1668: *An historical narration concerning heresie*. This book described the episode as follows:

> It pleas'd God ... to restore His most Gracious Majesty that now is, to his Fathers Throne, and presently [=at once] His Majesty restored the Bishops, and pardoned the Presbyterians; but then both the one and the other accused in Parliament this Book of Heresie, when neither [*sic*] the Bishops before the War had declared what was Heresie, when if they had, it had been made void by the putting down of the High Commission at the importunity of the Presbyterians.[152]

Although the natural reading of this passage is that the pardoned presbyterians at once teamed up with the returning bishops, Hobbes did not pin the accusation down to any particular date. The presbyterian influence was strongest in the Convention parliament that sat till the end of December 1660, but the bishops themselves did not sit in that assembly. The most likely explanation is simply that the wording is misleading (the phrase 'but then' might cover a period of years), and that he was referring to a later episode.

At all events, the scare described by Aubrey was probably quite brief, because there is no evidence that Hobbes attempted to defend himself; none of his works discussing heresy law can be shown to date from earlier than 1666. He had good reason to be quite complacent, for he had benefited from a statute central to the settlement: the generous Act of Indemnity and Oblivion (1660). This legislation pardoned every crime committed in the Revolution period, excluding only a short list of offences and offenders; as it mentioned neither heresy nor Hobbes, he should thereafter have felt quite secure. In the *Apology* that he appended to *Seven philosophical problems* (1662), he said he had been attacked in a court sermon, but claimed that he did not 'rely upon Apologies, but on Your Majesties most Gracious General Pardon'.[153]

[151] Ibid., I 339n. [152] *Hist. narr.*, 160 (EW IV 407).

[153] This is the English wording published by Crooke in 1682 (*Seven philosophical problems*, sig. A2v: EW VII 4); the Latin original published in 1662 reads 'Non tamen ut Apologiae qualicunque, sed Amnestiae generali confidere consilium mihi sit' (*Problemata physica*, sig.A4v–5r; OL IV 301). According to Crooke, the English was 'translated by himself, and presented to His Majesty, with the Epistle prefix'd, in the Year 1662 at the

This feeling of security would have been shattered as soon as he heard of the House of Commons order of 17 October 1666

> That the Committee to which the Bill against Atheism and Profaneness is committed, be impowered to receive Information touching such Books as tend to Atheism, Blasphemy, or Profaneness, or against the Essence or Attributes of God; and, in particular, the Book published in the name of one *White*; and the Book of Mr. *Hobbs*, called *The Leviathan*.[154]

A tradition in the Cavendish family, committed to print in 1708, recorded the philosopher's reaction:

> In *October* 1666, when Complaint was made in Parliament against his Books, and some Proceedings against him were depending, with a *Bill against Atheism and Profaneness*; he was then at *Chatsworth*, and appear'd extreamly disturb'd at the News of it; fearing that Messengers would come for him, and that the Earl would deliver him up, and the Two Houses commit him to the Bishops, and they decree him a Heretick, and return him to the Civil Magistrate for a writ *de Heretico comburendo* ... Under these apprehensions of Danger he drew up *An Historical Narration of Heresie, and the punishment thereof*.[155]

It was probably this incident that prompted his first writings about the English law of heresy.

There is, however, one final episode that ought to be recorded. In 1668 one Daniel Scargill, a youthful Fellow of Corpus Christi, Cambridge, defended in the Cambridge schools a number of openly Hobbesian propositions. On 7 December that year, he was ordered by the University to make a recantation. On 25 March 1669, he was expelled and lost his fellowship, but he had somehow made some powerful friends, because by 28 May he had managed to elicit a letter from the King, asking the university for mercy. On 25 July, he publicly renounced his previous views and his recantation was published in London and Cambridge.[156] At the safe distance of three

same time they came forth in Latin'. If so, H presumably made a deliberate choice to omit the reference in the Latin version to an attack upon *Leviathan* 'in a sermon in your very presence' [in concione etiam coram te ipso] (*Problemata physica*, sig.A6; OL IV 302).

[154] *Commons Journal*, vol. VIII, 636.

[155] White Kennett, *A sermon preach'd at the funeral of the right noble William Duke of Devonshire: with some memoirs of the family of Cavendish* (London, 1708), 109–10. As Kennett was a well-informed contemporary historian, he probably supplied the date himself.

[156] *The recantation of Daniel Scargill publickly made before the University of Cambridge, in Great St Maries, July 25, 1669* (Cambridge, 1669). There were at least three simultaneous editions of this work. On the whole affair, see James L. Axtell, 'The Mechanics of

centuries, this is a highly entertaining text, for Scargill himself drew attention to the dismaying possibility that someone might 'mistake or suspect this confession and unfeigned renunciation of my sinful and accursed errors, for an act of civil disobedience or submission in me, performed according to my former principles, at the command of my Superiors'.[157]

Hobbes nonetheless failed to achieve the necessary spirit of detachment, and wrote a letter to an unnamed Colonel 'concerning Dr Scargill's recantation sermon'. This letter has not survived, partly because he foolishly despatched his personal copy to the government censor Sir John Berkenhead (1616–79) in an unsuccessful attempt to get it licensed.[158] According to Scargill himself (writing in 1680),

> He writt about 3 or 4 sheets of paper, but I remember little of ym but yt he pretended the university had forfeited her Charter by exceeding her Commission or delegated Authority, and he made a mighty quoteing of his Leviathan in defence of himself yt [*sic*] I remember Sir John Birkenhead fell a swareing, The mans starved yt eates his own flesh.[159]

One reason why Hobbes was so exercised about the whole affair may be that he erroneously thought the university had imprisoned Scargill. This was what Dr Blackburne, his biographer, believed, prompting Scargill himself to comment that 'I wonder ... who it is yt writes at all adventures thus, and say's the university imprison'd me for the Cause, which they never offer'd to doe; he might as well have made me one of his Martyrs.'[160]

Hobbesian accounts of heresy law

Against the background of these episodes, Hobbes gave four different accounts of English heresy law which seem to have been meant as comprehensive. In ascending order of accuracy and fullness, they are

Opposition: Restoration Cambridge v. Daniel Scargill' in *Bulletin of the Institute of Historical Research* 38 (1965), 102–11; Jon Parkin, 'Hobbism in the later 1660s: Daniel Scargill and Samuel Parker', *Historical Journal* 42 (1999), 85–108.

[157] Scargill, *Recantation*, 7.

[158] *Brief Lives*, I 360–1.

[159] BL, Add. MS 38,693, fo. 131v. As Malcolm points out, H actually wrote two letters on the subject, one to the unnamed colonel and a second to Berkenhead, presumably protesting at Berkenhead's refusal to publish the first. Scargill could be referring to either (HW, *Correspondence*, lv–vii).

[160] BL, Add. MS 38,693, fo. 130r, referring to *Vita*, 107 (OL I xliii).

found in the Appendix to the Latin version of *Leviathan* (1668), the *Historical Narration concerning Heresie*, the *Dialogue*, and the 'Chatsworth manuscript'. It can be argued with some confidence that the first of the three other works was the Appendix, because the account of the law to be found in this text made a surprising and unique admission. Before the statute made by Henry IV, there was just one known precedent for burning heretics, but the Appendix stated that the penalty of burning dated from shortly after the papacy of Pope Alexander III (d. 1181), and that 'however that may be, it is certain that in our England, from near that time until the times of Queen Elizabeth, by a custom passing into Law heretics have usually been burned'.[161] This simple error was accompanied by what appear some dangerous concessions. He did not contest the legality of the post-Reformation executions (although he did attack the High Commission for failing to publish the doctrines it defined as heresy).[162] He also noted, accurately, that heretics at the time that he was writing could be punished

> also by those penalties which follow excommunication by force of the civil laws. For he will be summoned to the ecclesiastical court, where, unless he condemns his error, he will be handed over to the secular power, to be put in jail. He will remain there until he renounces his heresy and performs the penance established by the laws.[163]

Hobbes let the Appendix be printed some time in early 1668. By the time that he wrote the *Historical Narration concerning Heresie*, which we know he had completed by late June,[164] he had evidently taken a look at the statutes and settled on another strategy. The *Narration* pointed out that 'the first Law that was here made for the punishments of Hereticks called *Lollards*, and mentioned in the Statutes, was in the fifth year of the reign of

[161] 'Utcunque id sit, certum est, in Anglia nostra, ab illo ferè tempore, usque ad tempora Reginae Elizabethae consuetudine quadam in Legem transeunte, Haereticos comburi solitos esse' (*Lat. Lev.*, 354–5; OL III 552).

[162] *Lat. Lev.*, 355, 357 (OL III 553–4, 555–6).

[163] 'Etiam poenis iis, quae excommunicationem (virtute Legum Civilium) consequuntur. Citabitur enim ad Curiam Ecclesiasticam, ubi, nisi errorem suum ipse damnet, tradetur potestati seculari in carcerem conjiciendus, ibi mansurus, donec Haeresi suo renuntiet, penitentiamque egerit Legibus constitutam' (*Lat Lev.*, 357: OL III 556).

[164] See his letter to Joseph Williamson of 30 June 1668, enclosing a complete text to be licensed and quoting a sentence (part of our *Narration*) that Williamson had found objectionable (HW, *Correspondence*, 699).

Richard the Second'.[165] This seems an unambiguous advance on the damaging and incorrect admission that heretics had customarily been burned; it should be remembered, however, that Hobbes distinguished between 'law' and custom. He had avoided stating that there was a custom, but he had not in fact ruled out the possibility. The *Narration* went on to insist that 1 Edward VI c.12, abolishing punishments for heresy, had never been repealed by Queen Mary, though Hobbes admitted it had been 'made useless' by the revival of the Lollard statutes.[166]

Though it is not especially surprising that Hobbes should have wished to believe that this enactment was still a part of English statute law, his evidence for its continuing force reveals an interesting misconception. He thought that it was 'not repealed ... insomuch as it was Debated, Whether or no they should proceed upon that Statute against the Lady *Elizabeth*'; the parallel passage in the *Dialogue* points out that 'the same Statute confirmeth the Statute of 25 *Ed*.3. concerning Treasons'.[167] Thus Hobbes believed that in the reign of Mary the principles of 25 Edward III (the great medieval summary of English treason law) depended for validity on their reaffirmation by a branch of 1 Edward VI c.12.

Here Hobbes had actually made two separate errors. The first, which was of no great interest, was a misreading of the statute book. He seems to have missed the statute 1 Mary st.1. c.1, which passed into law at the start of Mary's reign and reaffirmed the principles of 25 Edward III; there was therefore no need for the Marian regime to use 1 Edward VI c.12 against Elizabeth. His second mistake was conceptually revealing, because it showed the gulf between his attitudes and orthodox common law thinking. He assumed that this particular formulation of treason law depended upon statute. But 25 Edward III was usually taken to be a declarative statute; its primary intention was not so much to make new law as to resolve some ambiguities. What was more, its main effect was thought to have been to give additional safeguards to the subject by imposing a restrictive definition;[168] its repeal would thus have restored the

[165] *Hist. Narr*., 155 (EW IV 403).

[166] Ibid., 157 (EW IV 405).

[167] Ibid. Part of the letter sentence (Text, 99 and n) is evidently corrupt, but the context does show beyond reasonable doubt that the phrase 'the same Statute' refers to 1 Edward VI c.12.

[168] Sir William Staunford, *Les plees del coron* (London, 1557), fo. 1v; *Third Inst*., 2.

troubling vagueness of the pre-statutory situation. The Hobbesian misunderstanding of English treason law exactly mirrored his misunderstanding of the position about heresy. In both cases, he chose to believe that something that was part of common law was founded on a statutory basis.

This highly typical misapprehension was not, however, necessary to Hobbes's argument, for the *Narration* went on to maintain that Elizabeth abolished 'the Laws Ecclesiastical of Queen *Mary*, with all other former Laws concerning the punishments of Hereticks'.[169] There was therefore now 'no Statute by which a Heretick could be punished otherways, than by the ordinary Censures of the Church'.[170] Elizabeth did give to High Commission a power to 'declare or not declare, as they pleased, to be Heresie or not Heresie, any of those Doctrines which had been condemned for Heresie in the first four General Councils',[171] but they had never used their right to do so. At this point, Hobbes confronted an awkward piece of factual information:

> Some men may perhaps ask, whether no body were Condemned and Burnt for Heresie, during the time of the High Commission. I have heard there were: But they which approve such executions, may peradventure know better grounds for them than I do.[172]

In any case, he added, High Commission was abolished in 1641 in order to appease the presbyterians.[173]

The last of the three other works to be composed appears to have been the 'Chatsworth manuscript', which was a brief but generally accurate digest of English written law upon the subject. The manuscript agreed with the *Narration* that the provisions of 1 Edward VI c.12 were 'void' but not 'repealed' in Mary's reign.[174] It strengthened the *Narration*'s claims, however, by quoting the preamble of 2 Henry IV c.15 to show that heresy was then a new problem and therefore that there 'was no custome of burning men for religion'.[175] The

[169] *Hist. Narr.*, 157–8 (EW IV 405).

[170] Ibid., 158 (EW IV 406).

[171] Ibid., 158 (EW IV 405–6).

[172] Ibid., 159 (EW IV 406). These were the objectionable words which H had offered to delete in his letter to Sir Joseph Williamson (HW, *Correspondence*, 699).

[173] Ibid., 159 (EW IV 406–7).

[174] Samuel Mintz, 'Hobbes on the law of heresy: a new manuscript', *Journal of the History of Ideas* 29 (1968), 413.

[175] Ibid., 412.

Narration made no mention of the writs *de excommunicato capiendo* and *de heretico comburendo*, but the manuscript stressed that such writs must have a statutory basis.[176] In consequence, the latter introduced a novel error, maintaining that *de heretico comburendo* was 'founded upon the statute of 25 Henry VIII', when in fact the effect of that statute was simply to make the writ compulsory.

The *Dialogue*'s affinities were mainly with the Chatsworth manuscript. It too incorporated a denial that there had been pre-statutory burnings, a denial supported by noting that 'in the Preamble to [2 Henry IV c.15] it is intimated, that before those *Lollards* there never was any Heresie in *England*'.[177] It also shared the manuscript's insistence that writs must have a statutory basis and that *de heretico comburendo* was grounded in 25 Henry VIII c.14.[178] The only significant difference between them was that the *Dialogue* ignored the earliest heresy statute, the enactment of 5 Richard II that Foxe and Coke alleged had been forged by the clergy. This could be taken to suggest that the manuscript was written before Hobbes studied the *Third Institutes*, but it is just as likely that there is a straightforward explanation: the manuscript set out to summarize the contents of the printed statute book, in part because Hobbes was committed to the view that such publications provided an adequate 'verification' of the law.[179]

The *Dialogue*'s relation to the Chatsworth manuscript is not, of course, of very much importance; what matters is the probability that it post-dates the *Historical Narration* (a work almost certainly written in 1668). Simple comparison suggests that the relevant parts of the *Dialogue* are later. The point of the *Historical Narration* was to parade its author's erudition, but the *Dialogue* reports such additional details as the burning of the judaising deacon, the role of the writ *de heretico combwendo* and the name of the Arian Legate. Although this is an argument from silence, it has a

[176] Ibid., 414.

[177] Text, 98.

[178] Ibid., 120.

[179] The Ricardian statute's omission from the *Dialogue*'s account perhaps explains the *Dialogue*'s one mistake. Mary's regime revived three heresy statutes. The manuscript states, correctly, that they were 5 Richard II st.2 c.5, 2 Henry IV c.15, and 2 Henry V st.1 c.7; the *Dialogue* substituted 25 Henry VIII c.14 for 5 Richard II st.2. c.5 (Text, 99).

certain cumulative weight, especially as the *Dialogue*'s account of heresy seems tailored to respond to the Scargill affair (1669).

One reason why the Appendix and *Narration* appear so ill-informed on legal questions may be that knowledge of the law was no defence against a parliament. To judge by their order of 1666, the House of Commons saw *Leviathan* as manifesting 'Atheism, Blasphemy, or Prophaneness'. Hobbes must have remembered the case of the Quaker James Naylor, whose tongue was bored in 1656, at the instructions of the House of Commons, for the equally indeterminate offence of 'horrid blasphemy'.[180] The more precise idea of 'heresy' might well have proved to be irrelevant to the business of ensuring Hobbes's safety. The Scargill episode was different. Unlike the previous scare, the Scargill affair was narrowly concerned with heresy, and the villains of the piece were subordinate agents who might be deflected by legal argument.

The circumstances might have been invented to illustrate the tendencies Hobbes dreaded: the university authorities, a body of clergymen, had acted without state authority against the teacher of a Hobbesian doctrine. If (as Hobbes wrongly thought) they had imprisoned his young sympathizer, they had inflicted, what was more, a corporal punishment. If both the *Dialogue* and the manuscript were written after 1669, it is easy to see why both these later texts attacked the invocation of *de excommunicato capiendo*. It also becomes easier to see why the *Dialogue*'s view of parliament was generally rather favourable, and why 'Of Heresie' argues, against the logic of his earlier theory, that 'the Punishing of Offences can be determined by none but by the King, and that, if it extend to life or member, with the Assent of Parliament.'[181] This major theoretical concession would hardly have been made by somebody whose primary fear was of *parliamentary* action.

Conclusion: the unity of the work

All these laborious comparisons would be of little use if the two passages on heresy were wholly unconnected afterthoughts. But

[180] W. C. Abbott, *The Speeches and Writings of Oliver Cromwell*, 4 vols. (Cambridge, 1937–47), vol. IV, 356.

[181] Text, 102.

there are three good reasons for supposing that something like the passages in question formed part of the original design. The first is that Hobbes would have stumbled across the relevant facts while doing research for a work on common law. The general legal reading Hobbes attempted included four relevant works: Bracton's *De Legibus et Consuetudinibus Angliae* (1569), Fitzherbert's *La novel Natura Brevium* (1534), Coke's *Third Institutes* (1644), and Pulton's *Statutes at large* (1618).[182] Hobbes would hardly have consulted Fitzherbert or Coke on matters of no great significance without at least a glance at the views of these writers on a crime that he was said to have committed. His own account of his knowledge of Pulton's *Statutes* was that he 'look't over the Titles of the Statutes from *Magna Charta* downward to this present time. I left not one unread, which I thought might concern my self, which was enough for me that meant not to plead for any but my self.'[183] Together these works would have given him the facts that he appears not to have known when writing the *Narration*. The non-existence of a previous custom was a deduction from the statute book; the deacon's tragedy is found in Bracton;[184] Fitzherbert describes *de heretico combwendo* and the heresy chapter of Coke's *Third Institutes* of course discusses Legate.

A second and possibly more persuasive reason is that even the main body of the work gives evidence of concern with heresy. Some of the evidence that Hobbes was worried is fairly obvious. He had no need, for instance, to show the mutability of law by saying that 'he that should have said in Queen *Maries* time, that the *Pope* had no Authority in *England*, should have been Burnt at a Stake'.[185] Nor did he need to demonstrate that Kings can disregard their subjects' will by postulating that a parliament might seek to 'restore those Laws Spiritual, which in Queen *Maries* time were in Force'.[186] When he composed 'Of Soveraign Power', he must have had the powers of High Commission on his mind, because he made the words of 1 Elizabeth c.1 the basis of a mildly digressive objection.[187]

Although its bearing upon heresy law was rather less immediately clear, a still more significant detail was Hobbes's evident interest in royal actions pardoning offenders. Hobbes chose to end the section 'Of Soveraign Power' by discussing Charles II's Act of Oblivion,

[182] Dates are of first editions.
[183] Text, 8.
[184] Bracton, *De legibus*, 123v–4r.
[185] Text, 42.
[186] Ibid., 26.
[187] Ibid., 27.

concluding that it was equivalent to one of the regular royal 'parliament' or 'coronation' pardons.[188] He later returned to the subject, twice pouring scorn on Coke's belief that piracy was a 'Sea-*Felony*', not covered by a normal royal pardon.[189] A glance at the *Third Institutes* reveals why Hobbes was exercised about this arcane question, for heresy and piracy had something important in common. Coke's chapter about pardons had a paragraph which read in full as follows:

> The King may pardon one convict of heresie, or of any other offence punishable by the Ecclesiasticall law. In all proceedings in the Ecclesiasticall Court *ex officio*, the King may pardon the offence. The King may also pardon Piracy upon the sea; but by what word, and in what manner, see before in the Chapter of Piracy.[190]

A reader who pursued this reference would have found out that piracy was not a felony *at common law*; it was a principle of common law that a convicted felon lost his goods, but pirates were deprived of theirs *by statute*. A further reference pointed out that heretics too were allowed to keep their goods until they were deprived of them by 2 Henry V c.7.[191] It is easy to follow the Hobbesian train of thought: if a parliamentary statute of oblivion was really a type of royal general pardon, and if the crime of heresy had an analogy with piracy, then statutes of oblivion gave no security to heretics. This far-fetched line of argument was legally unsound (general pardons covered suits in episcopal courts undertaken 'pro Salute Animae'),[192] but the fact Hobbes thought it worth considering is most revealing of his state of mind.

A third and final reason for detecting a concern with heresy in the main body of the *Dialogue* is an apparent shift in legal theory. *Leviathan* stated quite clearly that 'he that goes about the violation of a Law, wherein no penalty is determined, expecteth an indeterminate, that is to say, an arbitrary Punishment.'[193] As readers may

[188] There is one obvious disanalogy: such pardons were available to any anxious subject, but they had to be applied for and the subject paid a fee.

[189] Text, 132, 134.

[190] *Third Inst*., 238.

[191] Ibid., 111 and marg. See also the matching cross-reference at 43 marg.

[192] William Gibson, *Codex Juris Ecclesiastici Anglicani*, 2nd edn. (Oxford, 1761), 1069. As Gibson noted at 352, some Tudor parliament pardons explicitly excluded heretics.

[193] *Lev*., 163.

remember, *Leviathan* also stated that ignorance of natural law was never an excuse, giving the most unfortunate example of the stranger attempting to teach 'a new Religion'.[194] The obvious inference would be that publishing a heresy was always criminal, whether or not behaviour of this kind was outlawed by specific legislation; in the absence of a written penal law by which the penalty had been determined, the heretic could thus expect to have an 'arbitrary punishment'. The *Dialogue* escaped this unwelcome conclusion by introducing a new principle: that only the sovereign in person was empowered to determine punishments.[195] In the absence of instructions on the subject, the judge was 'to consult the King before he pronounce Sentence of any irreparable dammage on the Offender'.[196] There is scope for disagreement on whether or not this doctrine had been implicit in the earlier work, but nobody could plausibly maintain that the idea was given prominence; in the *Dialogue*, by contrast, the section 'Of Punishments' opened by discussing 'who it is that hath the power, for an Offence committed to define and appoint the special manner of Punishment'[197]—and the sovereign's exclusive right to do so was defended in considerable detail.[198]

We are now in a position to tie together the themes of our discussion. The argument so far has established three points. The first is that the *Dialogue*'s legal theory is barely different from *Leviathan*'s, though it is much less full and rigorous. The most suggestive difference between them is the *Dialogue*'s insistence that only the sovereign can establish a new corporal punishment. The second is that the passages in which Hobbes treats the law of heresy incorporate some facts he did not know when writing the *Historical Narration*, but which he would have come across when reading for a work 'of common laws'. The last is that the main bulk of the treatise gives evidence of an anxiety about the common law of heresy.

We cannot say what prompted Hobbes to study the heresy chapter of the *Third Institutes*, though we can guess it was the fate of Scargill. We can, however, say that once he had done so, Coke's treatment of the law of heresy would have exemplified his grounds for hating common lawyers: their usurpation of the sovereign's role through the creation of new precedents. Hobbes made the connection explicit

[194] Ibid., 152. [195] Text, 114. [196] Ibid., 116.
[197] Ibid., 113.
[198] Ibid., 113–21. The passage about heresy is found at 119–20.

when he discussed Coke's attitude towards the Legate case. Hobbes commented that

> he himself confesseth, that no Statute against Heresie stood then in Force: when in the 9th year of King *James, Bartholomew Legat* was burnt for *Arianism*, and that from the Authority of the Act of 2 *Hen.* 4. *cap.* 15. and other Acts cited in the Margin, it may be gather'd, that the Diocesan hath the Jurisdiction of Heresie. This I say is not true: For as to Acts of Parliament it is manifest, that from Acts Repea-[137]led; that is to say, from things that have no being, there can be gathered nothing. And as to the other Authorities in the Margin, *Fitzherbert*, and the Doctor and Student, they say no more than what was Law in the time when they writ; that is, when the Popes Usurped Authority was here obeyed: But if they had Written this in the time of King *Ed.* 6. or Queen *Elizabeth*, Sir *Edw. Coke* might as well have cited his own Authority, as theirs; for their Opinions had no more the force of Laws than his. Then he cites this Precedent of *Legat*, and another of *Hammond* in the time of Queen *Elizabeth*; but Precedents prove only what was done, and not what was well done.[199]

Hobbes could regard Coke's treatment of the law of heresy as a peculiarly good example of the dangers of judicial precedent; there was a harmony between his theoretical anxieties about the political claims of common lawyers and his more concrete fears for his own safety. Whether or not John Aubrey had stimulated interest in law, it was surely this coincidence of motive which led him to compose the *Dialogue*.

Appendix: *Behemoth* and the *Dialogue*

There are thus good grounds for thinking that the main body of the *Dialogue* gives evidence of fear of a heresy charge, and therefore that the suspect passages formed part of the original design. One final piece of evidence corroborates these claims. According to his autobiography, Hobbes wrote *Behemoth*, his history of the troubles, 'around his eightieth year'.[200] His eightieth birthday fell in April 1668, but he can hardly have had time for it in 1667, when he was busy finishing the Latin version of *Leviathan*,[201] so it was probably composed in 1668–70.

[199] Ibid., 99–100. [200] 'Circa annum aetatis suae octogesimum' *Vita*, 17 (OL I xx).

[201] Working two hours a day, he had managed two-thirds of the job before November 1667; he hoped at that stage to finish the rest by Easter (HW, *Correspondence*, 693).

Behemoth has an interest for any reader of the *Dialogue*, for one of its principal targets was legalistic constitutionalism. Hobbes used the work to make his usual points about the effects of legal influence, complaining that the lawyers 'had infected most of the Gentry of *England* with their Maxims and Cases prejudged, which they call Presidents'.[202] Disastrously for Charles I, Hobbes thought, his leading supporters included a number of 'Lawyers by profession, or such Gentlemen as had the Ambition to be thought so,'[203] whose moderation hampered the royalist cause. This feature of *Behemoth*'s argument explained why John Whitehall, the lawyer who wrote *The Leviathan found out* (1679), felt moved to follow his earlier work with *Behemoth arraign'd* (1680), a pamphlet defending 'the *good men* of the late King's Party, which desired *Accommodation*'.[204]

At the time that Hobbes was writing, the leading surviving 'good man' was Edward Hyde, first Earl of Clarendon (1609–74), the constitutionalist royalist who later became Charles II's most important minister. Hyde fled into exile in 1667, but he devoted part of his retirement to *A Brief View and Survey of the Dangerous and Pernicious Errors to Church and State, in Mr Hobbes's book, entitled Leviathan* (Oxford, 1676), which noted that 'after the Kings return, he [Hobbes] came frequently to the Court, where he had too many Disciples'.[205] In an epistle dedicatory, dated 10 May 1673, Clarendon stated that he had composed it 'that all the World may know, how much you [Charles II] abhor all those extravagant and absurd Privileges, which no Christian Prince ever enjoied or affected';[206] he felt anxiety, in other words, that Hobbes might win the battle to interpret royalism. This fear was no doubt disproportionate. Though Clarendon quite possibly believed that he had been done down by Hobbesians, there is no need to postulate that anything that

[202] *Beh.*, 195 (EW VI 312).

[203] Ibid., 191 (EW VI 309).

[204] John Whitehall, *Behemoth arraign'd: or, a vindication of property against a fanatical pamphlet stiled Behemoth* (London, 1680), sig.A3r–A3v. Admittedly, Whitehall knew curiously little about the 1640s; these words, from his Epistle Dedicatory, were addressed to the King's ruthless general Prince Rupert, who was hardly a conciliatory figure.

[205] Clarendon, *Brief view*, 9.

[206] Ibid., *Brief view*, Ep. Ded. Clarendon says he finished the main body of the work in April 1670. One possible explanation for the date of the epistle would be that Charles had recently reverted to a respect for statutory law. On 8 March 1673, Charles rescinded his Declaration of Indulgence, which suspended penal laws against dissent.

either of them wrote would have been seen as relevant by younger politicians. But *Behemoth* does show that Hobbes had a continuing preoccupation with the shortcomings of the moderates, and therefore that contempt for their position was probably one motive behind the *Dialogue*.

It thus seems quite important that the *Dialogue* made a concession to moderate feeling that *Behemoth* explicitly rejected. The crucial passage was *Behemoth*'s discussion of the legality of Ship Money. As might have been expected, Hobbes claimed that it would be inequitable to leave the King without the right to tax and that 'the Common Law contained in Reports' had no legitimate bearing on the question; he conceded, however, that 'amongst the Statute Laws there is one called *Magna Charta* ... in which there is one Article, wherein a King heretofore hath granted, That no Man shall be distrained, that is, have his Goods taken from him, otherwise than by the Law of the Land'. Hobbes explained away this solitary exception as 'securing of every Man from such as abused the King's Power by surreptitious obtaining the King's Warrants'.[207]

This was a remarkable statement, revealing just how ignorant he was of a point of great importance to constitutionalists. No one who read the statute book with some degree of care could have been left in any doubt that Kings were forbidden by statute to tax without consent. This was conceded in the *Dialogue*, where the Lawyer states that

> I know, that there be Statutes express, whereby the King hath obliged himself never to Levy Money upon his Subjects without the consent of his Parliament. One of which Statutes is. 25 *Ed*. I. *c*. 6.in these words, *We have granted for us, and our Heirs, as well to Arch-Bishops, Bishops, Abbots, and other Folk of the Holy Church, as also Earls, Barons, and to all the Commonalty of the Land, that for no Business from henceforth, we shall take such Aids, Taxes, or Prizes, but by the common Consent of the Realm*. There is also another Statute of *Ed*. I. in these words, *No Taxes, or Aid shall be taken or Levyed by us, or our Heirs in our Realm, without the good will, and assent of the Arch-Bishops, Bishops, Earls, Barons, Knights, Burgesses, and other Freemen of the Land*; which Statutes have been since that time Confirmed by divers other Kings, and lastly by the King that now Reigneth.[208]

Denial of the existence of these statutes was not an eccentric conjecture, nor even a fraud with some prospect of success, but a quite

[207] *Beh*., 61 (EW VI 210). [208] Text, 17.

unambiguous error, and one that was virtually certain to be spotted by one of the groups that his text was concerned to attack. It therefore seems likely that *Behemoth* pre-dated Hobbes's course of legal reading. If so, Hobbes must have planned the *Dialogue* in full awareness of the threat of being prosecuted.

TEXTUAL INTRODUCTION

No manuscript of the *Dialogue* appears to have survived. The earliest printed edition, from which all others ultimately stem, was part of a volume printed by William Crooke entitled *The Art of Rhetoric, with a Discourse of The Laws of England* (1681).[1] As the General Introduction has explained, Hobbes seems to have given the manuscript to Crooke at least as early as 1673, presumably with an eye to circulation; a print-run was out of the question, because a book about the law had to be licensed by the senior judges, the most important of whom, Sir Mathew Hale, the Lord Chief Justice, had read it and expressed distaste for it. The licensing arrangements lapsed on 27 May 1679, but a letter Hobbes wrote to John Aubrey on 18 August reveals that he still wished to stop its printed publication:

> I have been told that my Booke of the Civill Warr is come abroad and am sorry for it, especially because I could not get his Majestye to license it, not because it is ill printed or has a foolish Title set to it. For I believe that any ingenious man may understand the wickednesse of that time, notwithstanding the Errors of the presse.
>
> The Treatise De Legibus at the end of it is imperfect. I desire Mr. Horne to pardon me that I consent not to his Motion. Nor shall Mr. Crooke himselfe get my consent to print it ...
>
> The priviledge of Stationers is (in my opinion) a very great hinderance to the advancement of all humane learning.[2]

The same day Hobbes felt moved to write to Crooke to 'thank you for taking my advice in not stirring about the printing of my Book

[1] The copy-text adopted here is the reissued copy found in *Tracts of Thomas Hobb's* (1681): British Library shelfmark 1490. cc. 33. I have collated with the following copies: Bodleian Library, Oxford, Wood 128; British Library, London 884.k.5; Cambridge University Library N. 4. 60, Syn. 68. 52. I am grateful to Noel Malcolm for doing an additional collation with a copy in his possession. I have also consulted: Aberdeen University Special Collections HN. 19. 76; Huntington Library, San Marino, CA 175855 and 600509; King's College, Cambridge A.14.10 and A.15.12; Trinity College, Cambridge T.13. 46.

[2] Bodleian Library, Aubrey MS 9, fo. 14r.

concerning the Civil Wars of *England*, &c.—I am writing somewhat for you to print in English.'[3]

Hobbes died on 4 December, so in the event, Crooke hardly had to wait, but there are signs the latter had cold feet about the actual printing of the treatise. When it eventually appeared, in 1681, it was bound up with two quite different works, Hobbes's own *A Briefe of the Art of Rhetorique* (a work first published in 1637 by William's predecessor Andrew Crooke)[4] and a work called *The Art of Rhetorick plainly set forth*. Crooke attributed the latter work to Hobbes, but we know that it was actually composed by the puritan and Ramist Dudley Fenner (?1558–87).

It is easy to see what had happened. As William's Preface of 1681 referred to *A Briefe* as written 'some thirty years since', he clearly did not know of its first edition. He must have been thinking of *A Compendium of the Art of Logick and Rhetorick in the English tongue*, a volume put out in 1651 by the printer Thomas Maxey, a business associate of Andrew's.[5] This 'compendium' had three principal components: a primer of Ramist Logic (attributed to 'R. F.'),[6] Hobbes' *A Briefe* (which was unattributed), and the Dudley Fenner material (which was said to be 'by a concealed Author'). William probably did not own a manuscript (his text of *A Briefe* was demonstrably based on Maxey's second edition),[7] so he had no doubt leapt to the conclusion that both the rhetorics were Hobbesian. But at all events, his error casts doubt upon his claim that he had printed from Hobbes's 'own true Copies'.[8]

The volume as a whole collates as follows (the *Dialogue* begins at the second sig. B):

$$A^4B\text{–}L^8M^4,\ B^4C\text{–}O^8P^4$$

A1–A4 are taken up by a portrait of Hobbes (at Av; this is missing in some copies), a general title page (A2), and William Crooke's brief

[3] HW, *Correspondence*, 774; cf. 771.

[4] The two were not father and son (ibid., 824).

[5] The previous year (1650), Maxey printed for Andrew an English translation of Virgil (Wing V609).

[6] R[obert] F[age].

[7] This was shown by Mary C. Dodd, 'The rhetorics in Molesworth's edition of Hobbes', *Modern Philology* 50 (1952), 36–42.

[8] Text, 5.

preface 'To the Reader' (A3–4); B1–M4 are occupied by the two rhetorical works, which are continuously paginated. The *Dialogue* has no separate title page and the page numbers, which begin again, differ in style from their predecessors (the *Dialogue*'s numbers are printed in round brackets). John Aubrey, who was clearly not involved, described it as 'bound up with his *Rhetorique* [so] that one cannot find it but by chance'.[9]

All this suggests a rather late decision to sell the works together. Crooke's preface suggests that his motive was fear of being identified with Hobbesian political opinions. He carefully avoided endorsing the *Dialogue*'s message, merely noting that Hobbes had attempted 'to accommodate the general notions of his Politic to the particular constitution of the *English* Monarchy. A design of no small difficulty, wherein to have succeeded, deserves much Honour; to have perchance miscarryed, deserves easie Pardon.'[10] Still more revealingly, he stressed that it was

> not to be expected, that al Men should submit to his Opinions, yet 'tis hoped none will be offended at the present Publishing these Papers, since they will not find here any new fantastic Notions, but only such things as have been already asserted with strength of Argument by himself, and other Persons of eminent Learning. To the Public at least this Benefit may accrue, that some able Pen may undertake the controversie, being moved with the desire of that reputation, which will necessarily attend Victory over so considerable an Adversary.[11]

Crooke's nervousness has probably had some effect upon the work's reception. He subsequently reissued his edition as part of a still larger compilation called *Tracts of Thomas Hobb's* (1681),[12] but never sold the *Dialogue* on its own; it was not until the excellent Chicago edition of 1971 that anyone encountered it as a freestanding volume. But his timidity is less important, for narrow editorial purposes, than his apparent failure to proof-read what he printed. Collation of six copies[13] has revealed one variant (the correction of an obvious misspelling: 'Sheirs' for 'Shires'),[14] but it is difficult to believe that there was any systematic checking; at several points, the prose is simply

[9] Aubrey, *Brief Lives*, I 44. [10] Text, 6. [11] Ibid.

[12] This volume reissues five previous publications; its only novel feature is an inserted general title page. For details, see Hugh Macdonald and Mary Hargreaves, *Thomas Hobbes: A Bibliography* (London, 1952), 73–4.

[13] See n.1 above. [14] Text, 32.

unintelligible without some speculative emendation. It may be, of course, that Crooke was being faithful to an extremely faulty manuscript, but the compositor he used showed other signs of mild incompetence: over-frequent interlinear hyphenation, omission of gaps between words, and failure to observe consistent conventions in punctuation and abbreviation. In all these respects, the *Dialogue* was a shoddier piece of work than other treatises in the *Tracts* volume.

It is likely, then, that Crooke was negligent, but he may have faced unusual difficulties, especially if Hobbes released the *Dialogue* in what for him was an unpolished state; it would be interesting to know, for instance, why a short passage on p.31 appears to have been printed out of sequence. Part of the problem must have been that Hobbes relied on an amanuensis. From about 1655, we know that Hobbes was subject to a 'palsy' that made it very hard for him to write, so we can be sure that the text was produced by dictation.[15] As a result, we should expect two different kinds of error in transmission, one arising from mishearing by Hobbes's assistant, the other from misreading by the compositor (or by some intermediate copyist). 'Confin'd' instead of 'can find' is probably an instance of the former;[16] '1206' instead of '120b' is an obvious example of the latter.[17] Needless to say, it would be most incautious to rest interpretative claims on any individual verbal detail. The reason for preserving all features of Crooke's text, however minor, is that they may assist us in deducing the likely contents of the manuscript.

Editorial principles

This edition sets out to preserve those features of the first edition's text that may conceivably give clues about the manuscript the printer used, including capitals (apart from the dropped capitals that follow the italicized subheadings), orthography, italics, and punctuation. I have omitted catchwords and interlinear hyphens, except in a handful of cases where the latter give rise to real ambiguities.[18] The ligature *ae* and the long *s* have both been modernized, but there have been no other silent changes. Corrections affecting the printing of just one word can be recovered from the foot of the page. In all

[15] HW, *Correspondence*, xxiii–xxv. [16] Text, 119. [17] Ibid., 84.

[18] i.e. where the hyphen joins two possible words, where it is followed by a lower-case letter, and where the surrounding text provides no other indication of the spelling that the compositor preferred.

other cases, additions to Crooke's text are placed within square brackets; where matter has been removed without replacement, a footnote prints it within angled brackets. Where only punctuation has been altered, I have followed the helpful convention, established by Howard Warrender's *De Cive*, of using the swung dash (∼). Thus where the text reads '. . . Reason,[x]' and a bracketless note reads '∼;' a comma has been substituted for the original semicolon.

A special difficulty has been caused by the *Dialogue*'s use of quotation, which was extensive and inaccurate. Hobbes clearly had a liberal view of what, exactly, constitutes quotation; he was seldom, if ever, deliberately misleading, but he seems to have felt no duty to be completely faithful to the wording of the passages he copied. So far as we know, he quoted from just seven volumes: the four parts of Coke's *Institutes*, 'Bracton', the statute book, and Christopher St German's *Doctor and Student*. I have marked passages, however brief, that he seems to have read aloud from one of these, but have not noted those discrepancies that make no significant difference to the meaning; a truly comprehensive register of possible misquotations would have to list all minor variants between editions that Hobbes might have used. I have also marked those passages where paraphrase appears to have been attempted, that is, where Hobbes tried to convey, *in full*, the substance (though not the original words) of some continuous section of his source.

It should be borne in mind that one detail that the process of dictation had probably left indeterminate was whether Hobbes was using his own words at any given moment. Crooke sometimes put quotations in italics or used inverted commas, but the first edition has no consistent device for indicating verbal borrowings. Even where Hobbes provided references, he frequently left it uncertain if he was quoting or just paraphrasing. I have reproduced Crooke's pointers, but have refrained from adding to or regularizing them (they could reflect *some* feature of the earlier manuscript).

Annotation

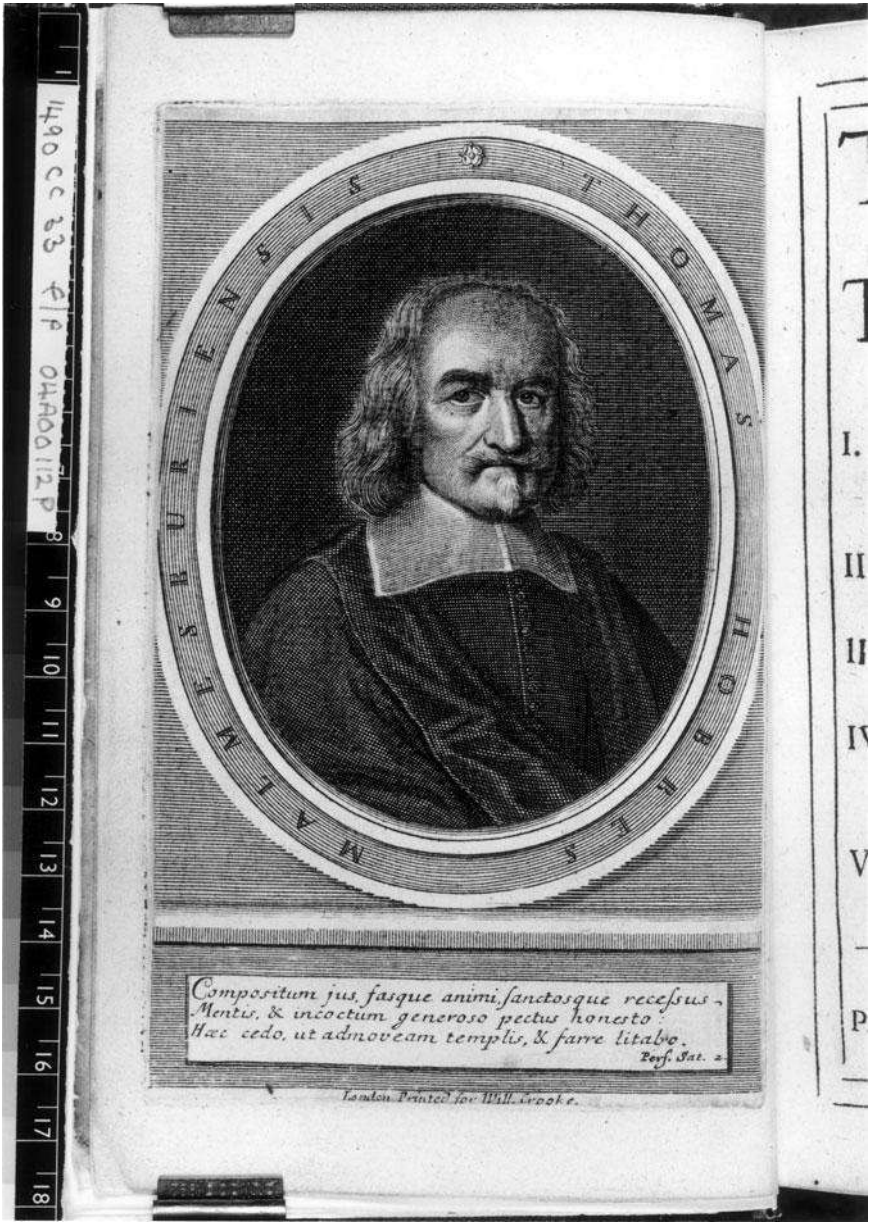
Notes signalled by superscript letters are relevant to establishing the text; all other notes have been arranged in a numerical series. The present edition has benefited from the emendations to be found in *The Moral and Political Works of Thomas Hobbes of Malmesbury* (1750), Sir William Molesworth's *English works* (1841), and the

version edited by Joseph Cropsey (1971). The first two slightly modernized those details of the text that seemed to have no relevance to meaning. An *apparatus criticus* seemed needless, but the notes record a number of Cropsey's suggestions that seemed particularly valuable.

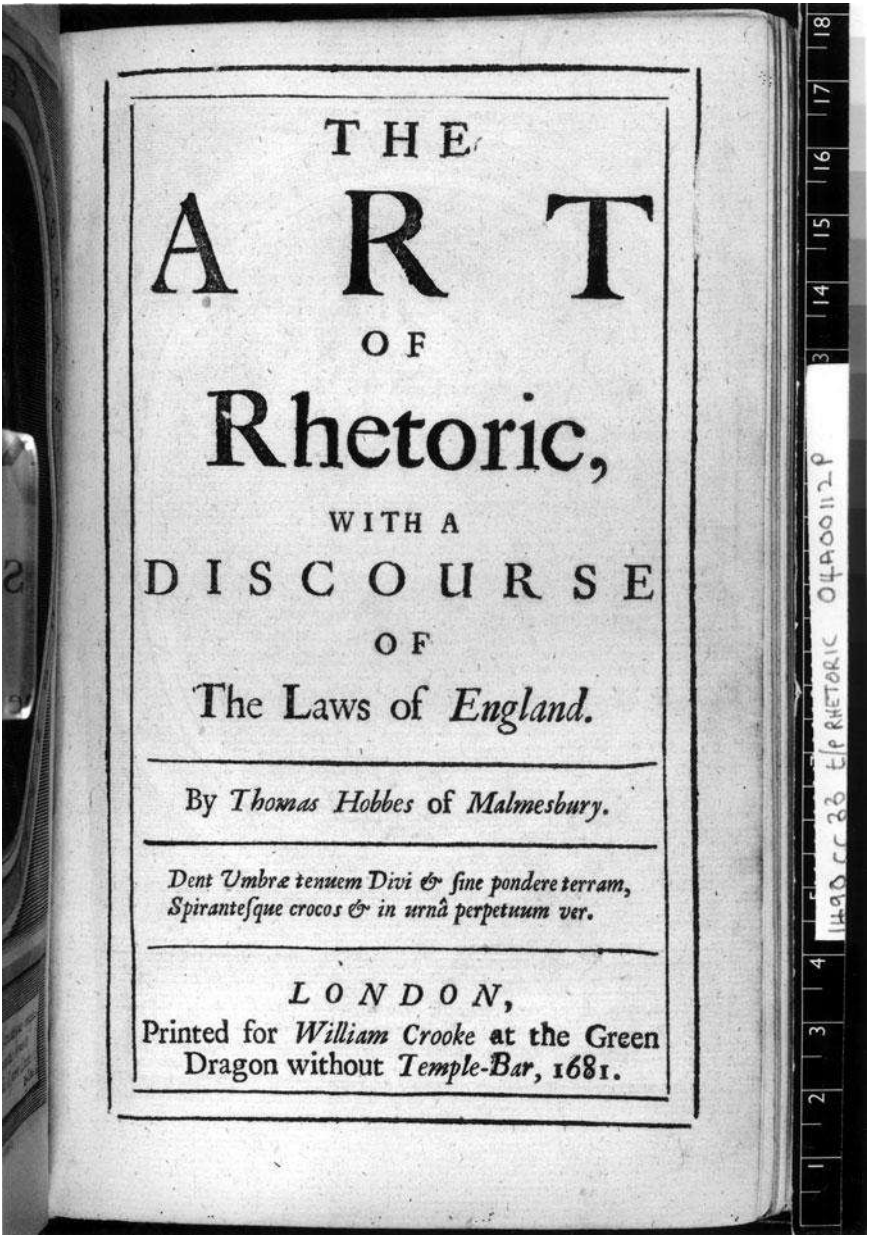
The numerical series of notes does not provide continuous commentary, but sets out to facilitate informed interpretation of the text. I have followed Howard Warrender's convention of using the symbol '=' to introduce notes that gloss unfamiliar words. Where Hobbes makes unambiguous factual errors, I have corrected them. Where legal matters are concerned, I have frequently referred to *Les termes de la ley ... newly corrected and enlarged*, ed. T. B. [Thomas Blount] (London, 1667), a copy of which may have been available at Hardwick.[19] A comparable modern work would certainly give sharper definitions, but at the cost of some anachronism. In general, I have tried to give the background information that Hobbes could assume in a perfect contemporary reader, including information about his earlier works. When viewed against this background, a number of startling doctrines appear surprisingly conventional.

[19] The book listed as 'Termes of the law' in Chatsworth MSS, Hardwick 16* was probably some edition of this standard reference work.

A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT, OF THE COMMON LAWS OF ENGLAND


THOMAS HOBBIUS MALMESBURIENSIS
Compositum jus, fasque animi, sanctosque recessus
Mentis, & incoctum generoso pectus honesto?
Hæc ego, ut admoveam templis, & farre litabo.
Pers. Sat. 2.
London Printed for Will. Crooke.

Portrait of Hobbes at sig. Av.



THE

ART

OF

Rhetoric,

WITH A

DISCOURSE

OF

The Laws of *England.*

By *Thomas Hobbes* of *Malmesbury.*

Dent Umbræ tenuem Divi & ſine pondere terram,
Spiranteſque crocos & in urnâ perpetuum ver.

LONDON,
Printed for *William Crooke* at the Green
Dragon without *Temple-Bar*, 1681.

1490 cc 23 E/P RHETORIC 04800112 P

Title-page of first edition

TO THE READER

Altho these pieces may appear fully to express their own real intrinsic value, as bearing the Image and Inscription of that great Man Mr. Hobbes; *yet since common usage has rendred a Preface to a Book as necessary as a Porch to a Church, and that in all things some Ceremonies cannot be avoided, Mode and Custom in this point is dutifully to be obeyed.*

That they are genuine, credible testimony might be produced; did not the peculiar fineness of thought and expression, and a constant undaunted resolution of maintaining his own Opinions sufficiently ascertain their Author. Besides which, they are now Publish'd from his own true Copies, [A3v] *an advantage which some of his works have wanted.*[1]

The first of them, being an abridgement containing the most useful part of Aristotle's *Rhetoric, was written some thirty years since.*[2] *Mr.* Hobbes *in his Book of* Humane Nature *had already describ'd Man, with an exactness almost equal to the original draught of Nature; and in his* Elements of Law, *laid down the constitution of Government, and shewn by what Arm'd Reason it is maintain'd.*[3] *And having demonstrated in the State of Nature, the Primitive Art of Fighting to be the only medium whereby Men procur'd their ends; did in this design to shew what Power in Societies has succeeded to reign in its stead. I mean the Art of speaking, which by use of Common places of Probability, and knowledge in the manners and passions of Man=kind,*[a] *throu the working of Belief is able to bring about whatsoever Interest.*

How necessary this Art is to that of Politic, is clearly evident from that mighty force, whereby the Eloquence of the Anci=[A4]*ent Orators*

[1] The reference is probably to the unauthorized versions of *Beh*. Crooke's Preface to his own edition complained 'how much both the World, and the Name of Mr. *Hobbs* have been abus'd by the several spurious Editions of the History of the Civil Wars; wherein, by various and unskilful Transcriptions, are committed above a thousand faults, and in above a hundred places whole Lines left out' (*Beh*., sig.A4).

[2] This is *A Briefe of the Art of Rhetorique* (1637), which will be published elsewhere in HW. Crooke is evidently referring to the second edition of 1651. See p. lxvii above for the source of this error.

[3] The two parts of *Elements of law* were printed separately in 1650 as *Human nature; or the fundamental elements of policy* and *De corpore politico; or the elements of law, moral and politic*.

[a] Interlinear hyphen.

captivated the minds of the People. Mr. Hobbes *chose to recommend by his Translation the Rhetoric of* Aristotle, *as being the most accomplish'd work on that Subject, which the World has yet seen, having been admir'd in all Ages, and in particular highly approv'd by the Father of the Roman Eloquence,*[4] *a very competent Judge. To this he thought fit to add some small matter relating to that part which concerns*[a] *Tropes and Figures; as also a short discovery of some little tricks of false and deceitful Reasoning.*[5]

The other piece is a Discourse concerning the Laws of England, *and has been finish'd many years.*[6] *Herein he has endeavour'd to accommodate the general notions of his Politic to the particular constitution*[7] *of the* English *Monarchy. A design of no small difficulty, wherein to have succeeded, deserves much Honour; to have perchance miscarryed, deserves easie Pardon. It has had the good fortune to be much esteem'd by the greatest Men of the Profession of the Law,*[8] *and therefore may be pre=*[A4v]*sumed to contain somewhat excellent. However 'tis not to be expected, that al Men should submit to his Opinions, yet 'tis hoped none will be offended at the present Publishing these Papers, since they will not find here any new fantastic Notions, but only such things as have been already asserted with strength of Argument by himself, and other Persons of eminent Learning. To the Public at least this Benefit may accrue, that some able Pen may undertake the controversie, being moved with the desire of that reputation, which will necessarily attend Victory over so considerable an Adversary.*

[4] If Cicero is meant, the reference is perhaps to *De Inventione*, 15.

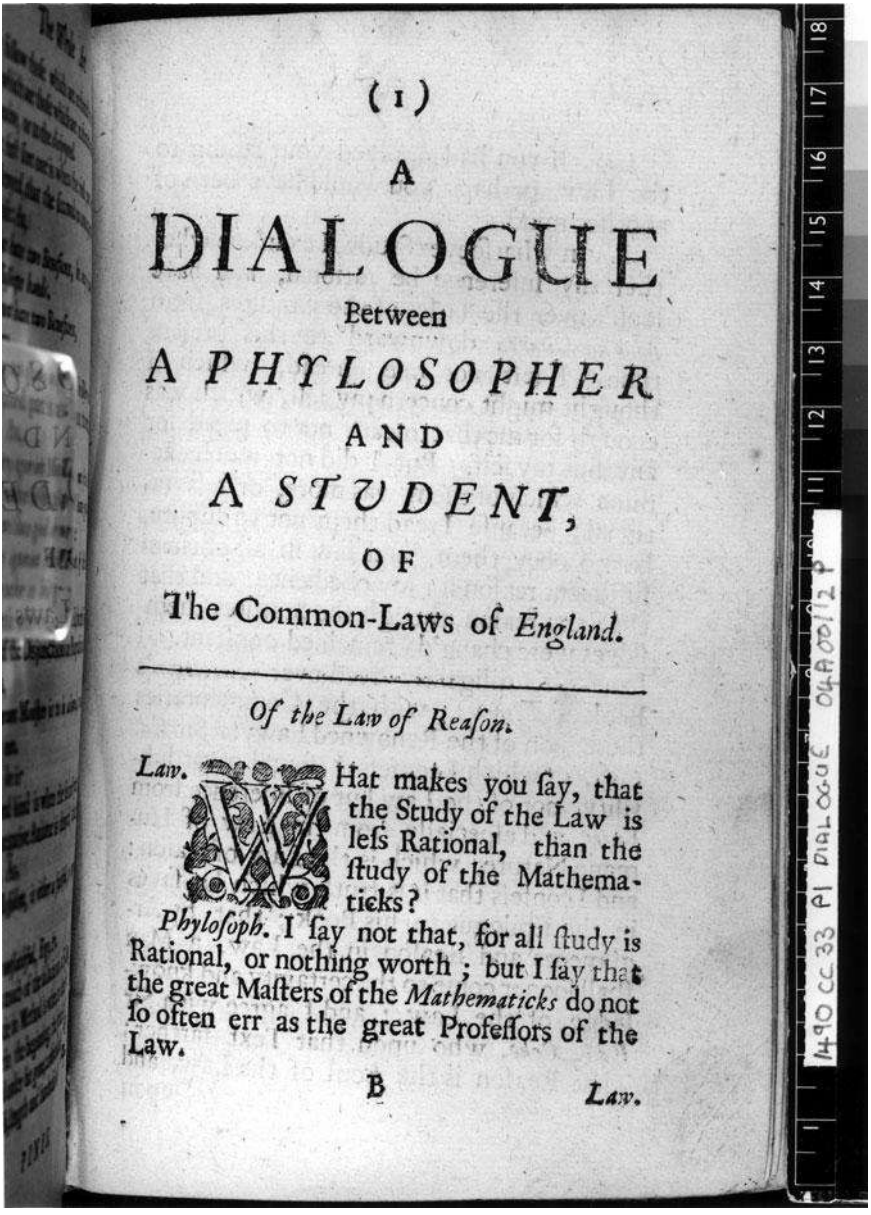
[a] *concern's*

[5] This matter is not by Hobbes. See above, p.lxvii.

[6] Crooke had possessed a copy since at least 1673. See above, p. xvii, xix.

[7] =form, make-up, character.

[8] Cf. Blackburne's biography, which describes it as 'commentarium . . . doctissimis J[uris]C[onsul]tis in pretio habitum [a commentary prized by the most learned lawyers]' (*Vita*, 98–9; OL I, xl); the probable source in both cases was John Aubrey, whose writings name Chief Justice Sir John Vaughan (1603–74) and Serjeant Robert Stevens (d. 1675) as legal admirers of H (*Brief lives,* I 342, 372).



(1)

A

DIALOGUE

Between

A *PHYLOSOPHER*

AND

A *STUDENT*,

OF

The Common-Laws of *England*.

Of the Law of Reason.

Law. WHat makes you say, that the Study of the Law is less Rational, than the study of the Mathematicks?

Phylosoph. I say not that, for all study is Rational, or nothing worth; but I say that the great Masters of the *Mathematicks* do not so often err as the great Professors of the Law.

1490 cc 33 pl DIALOGUE 04A0D112 P

Page 1 of *A Dialogue*

Of the Law of Reason.

Law. What makes you say, that the Study of the Law is less Rational, than the study of the Mathematicks?

Phylosoph. I say not that, for all study is Rational, or nothing worth; but I say that the great Masters of the *Mathematicks* do not so often err as the great Professors of the Law.[9] [2]

Law. If you had applied your reason to the Law, perhaps you would have been of another mind.

Ph. In whatsoever Study, I examine whether my Inference be rational, and have look't over the Titles of the Statutes from *Magna Charta* downward to this present time.[10] I left not one unread, which I thought might concern my self, which was enough for me that meant not to plead for any but my self. But I did not much examine which of them was more, or less rational; because I read them not to dispute, but to obey them, and saw in all of them sufficient reason for my obedience, and that the same reason, though the Statutes themselves were chang'd, remained constant. I have also diligently read over *Littleton*'s Book of *Tenures*, with the Commentaries thereupon of the Renowned Lawyer Sir *Ed. Coke*,[11] in which I confess I found great subtility, not of the Law, but of Inference from Law, and especially from the Law of Humane Nature, which is the Law of reason: and I confess that it is truth which he sayes in the Epilogue to his Book; that [12]by Arguments and Reason in the Law, a Man shall sooner come to the certainty and knowledge of the Law: and I

[9] Given H's controversies with the Oxford mathematicians, some irony may be intended here.

[10] Magna Charta was usually dated to the ninth year of Henry III (1225) and treated as the oldest surviving statute. As general collections of statutes were chronologically organized, it was printed at the start of all such volumes.

[11] Sir Thomas Littleton's *Tenures* (written *c.* 1470, in Law French) was a lucid introduction to land law, extravagantly admired by common lawyers. By 1600 'Littleton' was proverbially 'not now the name of a Lawyer, but of the Law it selfe' (Fulbecke, *Direction*, 27), a tag incorporated in the title of Sir Edward Coke, *The first part of the Institutes of the Lawes of England. Or, A Commentarie upon Littleton, not the name of a lawyer onely, but of the law it selfe* (London, 1628). Coke printed Littleton in full with a parallel translation into English; his commentary was keyed to specific French phrases, but the connection with the text was often no more than tangential.

[12] Quot. to 'of the Law' (*First Inst.*, 394b–95a), except that Coke wrote 'by the arguments and reasons' (the plural is of some significance).

agree with Sir *Edw. Coke*, who upon that Text [says] farther; That Reason is the Soul of the Law,[13] and [3] upon sect. 138. [14]*Nihil quod est Rationi contrarium est licitum*; that is to say, nothing is Law that is against Reason: and that Reason is the life of the Law, nay the Common Law it self is nothing else but Reason. And upon Sect. 21. *Aequitas est perfecta quaedam Ratio, quae Jus scriptum interpretatur & emendat, nulla scriptura comprehensa, sed solum*[a] *in vera Ratione consistens*.[15] *i.e.* Equity is a certain perfect Reason that interpreteth and amendeth the Law written, it self being unwritten, and consisting in nothing else but right Reason. When I consider this, and find it to be true, and so evident as not to be denyed by any Man of right sense, I find my own reason at a stand; for it frustrates all the Laws in the World: for upon this ground any Man, of any Law whatsoever may say it is against Reason, and thereupon make a pretence for his disobedience. I pray you clear this passage, that we may proceed.

La. I clear it thus out of Sir *Edw. Coke*. I *Inst. Sect.* 138. that this [16]is to be understood of an artificial perfection of Reason gotten by long Study, Observation and Experience, and not of every Mans natural Reason; for *Nemo nascitur Artifex*.[17] This Legal Reason is *summa Ratio*;[18] and therefore if all the Reason that is dispersed into so many several heads were united into one, yet could he [4] not make such a Law as the Law of *England* is, because by so many successions of Ages it hath been fined and refined by an infinite number of Grave and Learned Men.

[13] This was Coke's gloss on Littleton's phrase 'the Arguments and the Reasons'.

[14] P/phrase to 'but Reason' (*First Inst.*, 97b). Coke's immediate qualification of this statement is discussed by H below.

[a] *solus*

[15] Coke's gloss on Littleton's phrase 'the equity of the statute' (a narrower conception than the one that H invokes). As Coke's discussion went on to explain, 'Equitie is a construction made by the Judges, that cases out of the letter of a stat., yet being within the same mischiefe, or cause of the making of the same, shall bee within the same remedie that the Statute provideth: And the reason hereof is, for that the Law maker could not possibly set down all cases in expresse termes' (*First Inst.*, 24b). The translation that follows is H's; a slightly different version is offered at p. 61.

[16] Quot. to end of speech (*First Inst.*, 97b). The words 'artificial . . . experience' are quoted, with an accurate page reference, at *Lev.*, 140.

[17] 'No one is born a craftsman.' Coke saw a close connection between 'artificial' and *artifex* (=craftsman). In ordinary usage, the word could mean 'displaying special art or skill' (OED 6–7) and 'according to the rules of art' (OED 10).

[18] 'The highest Reason.'

Ph. This does not clear the place, as being partly obscure, and partly untrue;[a] that the Reason which is the Life of the Law, should be not Natural, but Artificial I cannot conceive. I understand well enough, that the knowledge of the Law is gotten by much study, as all other Sciences are, which when they are studyed and obtained, it is still done by Natural, and not by Artificial Reason. I grant you that the knowledge of the Law is an Art, but not that any Art of one Man, or of many how wise soever they be, or the work of one and more Artificers, how perfect soever it be, is Law. It is not Wisdom, but Authority that makes a Law.[19] Obscure also are the words Legal Reason; there is no Reason in Earthly Creatures, but Humane Reason; but I suppose that he means, that the Reason of a Judge, or of all the Judges together (without the King) is that *Summa Ratio*, and the very Law, which I deny, because none can make a Law but he that hath the Legislative Power. That the Law hath been fined by Grave and Learned Men, meaning the Professors of the Law is manifestly untrue, for all the Laws [5] of *England* have been made by the Kings of *England*, consulting with the Nobility and Commons in *Parliament*, of which not one of twenty was a Learned Lawyer.

Law. You speak of the Statute[b] Law, and I speak of the Common Law.

Ph. I speak generally of Law.

La. Thus far I agree with you, that Statute Law taken away, there would not be left, either here, or any where, any Law at all that would conduce to the Peace of a Nation; yet Equity, and Reason which [are] Laws Divine and Eternal, which oblige all Men at all times, and in all places, would still remain, but be Obeyed by few: and though the breach of them be not punished in this World, yet they will be punished sufficiently in the World to come.[20] Sir

[a] ∼,

[19] Cf. *Lev.*, 143, a passage condensed by *Lat. Lev.* into 'Authoritas, non Veritas, facit Legem [Authority, not Truth, makes Law]' (*Lat. Lev.*, 133: OL III 202). Cf. also St German's statement that the law-maker needs 'wysdom & auctoritye wysedom that he may Iuge after reason . . . Auctoritye that he have auctoritye to make lawes. For the lawe is named of Ligare: that is to say to bynde. But the sentence of a wyse man doth not bynde the commynaltie yf he hath no rewle over theym' (*Dr and student*, 27).

[b] Statue

[20] According to *Lev.*, the good will live forever, while the resurrected wicked will endure a period of torment before a second death (*Lev.*, 244–5, 344–6). But *Lev.* also maintains that

Edw. Coke for drawing to the Men of his own Profession as much Authority as lawfully he might, is not to be reprehended; but to the gravity and Learning of the Judges they ought to have added in the making of Laws, the Authority of the King, which hath the Soveraignty: for of these Laws of Reason, every Subject that is in his Wits, is bound to take notice at his Peril, because Reason is part of his Nature, which he continually carryes about with him, and may read it, if he will.[21] [6]

Ph. 'Tis very true; and upon this ground, if I pretend within a Month, or two to make my self able to perform the Office of a Judge, you are not to think it Arrogance; for you are to allow to me, as well as to other Men, my pretence[22] to Reason, which is the Common Law (remember this that I may not need again to put you in mind, that Reason is the Common Law) and for Statute Law, seeing it is Printed, and that there be Indexes to point me to every matter contained in them, I think a Man may profit in them very much in two Months.[23]

Law. But you will be but an ill Pleader.

Ph. A Pleader commonly thinks he ought to say all he can for the Benefit of his Client, and therefore has need of a faculty to wrest the sense of words from their true meaning; and the faculty of *Rhetorick* to seduce the Jury, and sometimes the Judge also, and many other Arts, which I neither have, nor intend to study.

La. But let the Judge how good soever he thinks his Reasoning, take heed that he depart not too much from the Letter of the Statute: for it is not without danger.

Ph. He may without danger recede from the Letter, if he do not from the meaning and sense of the Law, which may be by a Learned Man, (such as Judges commonly [7] are) easily found out by the Preamble, the time when it was made, and the Incommodities for which it was made:[24] but I pray tell me, to what end

it would still be rational to obey the law of nature even without this powerful incentive (ibid., 72–3).

[21] Cf. *El*., II x 10; *De C*., xiv 14; *Lev*., 140–1.

[22] =claim.

[23] All public statutes were printed as a matter of course as soon as they were passed. H clearly had access to an edition of *The Statutes at large*, ed. Ferdinando Pulton (London, 1618), which printed every statute from Magna Charta onwards, including enactments subsequently repealed.

[24] Cf. *Lev*., 145. This way of finding out the 'meaning and sense' was perfectly acceptable to lawyers; Coke himself believed that judges should identify 'the mischief and defect for

were Statute-Laws ordained, seeing the Law of Reason ought to be applyed to every Controversie that can arise.

La. You are not ignorant of the force of an irregular Appetite to Riches, to Power, and to sensual Pleasures, how it Masters the strongest Reason, and is the root of Disobedience, Slaughter, Fraud, Hypocrisie, and all manner of evil habits; and that the Laws of Man, though they can punish the fruits of them, which are evil Actions, yet they cannot pluck up the roots that are in the Heart. How can a Man be Indicted of Avarice, Envy, Hypocrisie, or other vitious Habit, till it be declared by some Action, which a Witness may take notice of; the root remaining, new fruit will come forth till you be weary of punishing, and at last destroy all Power that shall oppose it.

Ph. What hope then is there of a constant Peace in any Nation, or between one Nation, and another?

La. You are not to expect such a Peace between two Nations, because there is no Common Power in this World to punish their Injustice: mutual fear may keep them quiet for a time, but upon every visible [8] advantage they will invade one another, and the most visible advantage is then, when the one Nation is obedient to their King, and the other not; but Peace at home may then be expected durable, when the common people shall be made to see the benefit they shall receive by their Obedience and Adhaesion to their own Soveraign, and the harm they must suffer by taking part with them, who by promises of Reformation, or change of Government deceive them. And this is properly to be done by Divines, and from Arguments not only from Reason, but also from the Holy Scripture.[25]

Ph. This that you say is true, but not very much to that I aim at by your Conversation, which is to inform my self concerning the Laws of *England*: therefore I ask you again, what is the end of Statute-Laws?

which the common law did not provide' and then 'make such construction as shall suppress the mischief . . . according to the true intent of the makers of the Act' (*Third reports*, 7b; ER LXXVI 638).

[25] Cf. *De C*., xiii 9; *Lev*., 175–7; *Beh*., 96, 116 (EW VI 237, 252).

La. I say then that the scope[26] of all Humane Law is Peace, and Justice in every Nation amongst themselves, and defence against Forraign Enemies.

Ph. But what is Justice?

La. Justice is giving to every Man his own. [9]

Ph. The Definition is good, and yet 'tis *Aristotles*;[27] what is the Definition agreed upon as a Principle in the Science of the Common Law?

La. The same with that of *Aristotle*.[28]

Ph. See you Lawyers how much you are beholding to a Philosopher, and 'tis but reason, for the more General and Noble Science, and Law of all the World is true Philosophy, of which the Common Law of *England* is a very little part.

La. 'Tis so, if you mean by Philosophy nothing but the Study of Reason, as I think you do.[29]

Ph. When you say that Justice gives to every Man his own, what mean you by his own? How can that be given me which is my own already? or, if it be not my own, how can Justice make it mine?

La. Without Law every thing is in such sort every Mans, as he may take, possess, and enjoy without wrong to any Man, every thing, Lands, Beasts, Fruits, and even the bodies of other Men, if his Reason tell him he cannot otherwise live securely: for the dictates of Reason are little worth, if they tended not to the preservation and improvement of Mens Lives.[a] Seeing then without Humane Law all things would be Common, and this Community a cause of Incroachment, Envy, Slaughter, and continual

[26] A common term in biblical hermeneutics. Literally 'a mark for shooting or aiming at' (OED1a), referring to the white patch at the centre of the target. Figuratively 'object, purpose, aim' (OED2a).

[27] Aristotle's definition of commutative (as opposed to distributive) justice (Aristotle, *Ethics*, 277).

[28] 'Constans & perpetua voluntas suum cuique tribuens [a constant and perpetual will giving each his own]' (Bracton, *De legibus*, 2v).

[29] *Lev*. defines philosophy as 'the Knowledge acquired by Reasoning, from the Manner of the Generation of any thing, to the Properties; or from the Properties, to some possible Way of Generation of the same; to the end to bee able to produce, as far as matter, and humane force permit, such Effects, as humane life requireth' (*Lev*., 367).

[a] ∼, seeing

War [10] of one upon another,[30] the same Law of Reason Dictates to Mankind (for their own preservation) a distribution of Lands, and Goods, that each Man may know what is proper to him, so as none other might pretend[31] a right thereunto, or disturb him in the use of the same. This distribution is Justice, and this properly is the same which we say is [ones own][a]: by which you may see the great Necessity there was of Statute Laws, for preservation of all Mankind.[32] It is also a Dictate of the Law of Reason, that Statute Laws are a necessary means of the safety and well being of Man in the present World, and are to be Obeyed by all Subjects, as the Law of Reason ought to be Obeyed, both by King and Subjects, because it is the Law of God.

Ph. All this is very Rational; but how can any Laws secure one Man from another? When the greatest part of Men are so unreasonable, and so partial to themselves as they are, and the Laws of themselves are but a dead Letter, which of it self is not able to compel a Man to do otherwise than himself pleaseth, nor punish, or hurt him when he hath done a mischief.

La. By the Laws, I mean, Laws living and Armed: for you must suppose, that a Nation that is subdued by War to an absolute submission of a Conqueror, it may by [11] the same Arm that compelled it to Submission, be compelled to Obey his Laws. Also if a Nation choose a Man, or an Assembly of Men to Govern them by Laws, it must furnish him also with Armed Men and Money, and all things necessary to his Office, or else his Laws will be of no force, and the Nation remains, as before it was, in Confusion. 'Tis not therefore the word of the Law, but the Power of a Man that has the strength of a Nation, that makes the Laws effectual. It was not *Solon* that made *Athenian* Laws (though he devised them) but the Supream Court of the People;

[30] Cf. *El*. I xiv 11; *De C*., i 11–12; *Lev*., 64. H has put his best-known doctrine into *La*.'s mouth. He simplifies the classic statements of his argument by omitting the important postulate that some (though not all) human beings are motivated by a wish to do their fellows down (*El*., I xiv 3; *De C*., i 4; *Lev*., 61).

[31] =claim.

[a] one owns

[32] 'And this they well knew of old, who called that Νόμος, (that is to say, *Distribution*,) which we call Law; and defined Justice, by *distributing* to every man *his own*' (*Lev*., 128). Cf. Finch, *Law*, 1.

nor the Lawyers of *Rome* that made the Imperial Law in *Justinian*'s time, but *Justinian* himself.[33]

Ph. We agree then in this, that in *England* it is the King that makes the Laws, whosoever Pens them, and in this, that the King cannot make his Laws effectual, nor defend his People against their Enemies, without a Power to Leavy Souldiers, and consequently, that he may Lawfully, as oft as he shall really think it necessary to raise an Army (which in some occasions[34] [may] be very great) I say, raise it, and Money to Maintain it. I doubt not but you will allow this to be according to the Law (at least) of Reason.

La. For my part I allow it. But you have heard how, in, and before the late Trou-[12]bles[35] the People were of another mind. Shall the King, said they, take from us what he please, upon pretence of a necessity whereof he makes himself the Judg?[36] What worse Condition can we be in from an Enemy! What can they take from us more than what they list?

Ph. The People Reason ill; they do not know in what Condition we were in the time of the Conqueror, when it was a shame to be an *English-Man*, who if he grumbled at the base Offices he was put to by his *Norman* Masters, received no other Answer but this, Thou art but an *English-Man*, nor can the People, nor any Man that humors them in their Disobedience, produce any Example of a King that ever rais'd any excessive Summs[a], either by himself, or by the Consent of his Parliament, but when they had great need thereof; nor can shew any reason that might move any of them so to do. The greatest Complaint by them made against the unthriftiness of their Kings was for the inriching now and then a Favourite,[37] which to the Wealth of the Kingdom was inconsiderable, and the Complaint but Envy. But in this point of raising Souldiers, what is I pray you the Statute Law?

La. The last Statute concerning it, is 13 *Car*. 2. *c*. 6. By which the Supream Government Command, and disposing of the [13]

[33] Cf. *Lev*., 139.

[34] 'Occasions' bears a connotation of 'necessity' (OED II 5 a).

[35] A conventional and politically neutral way of referring to 1640–1660.

[36] King Charles I had justified demanding Ship Money, a non-parliamentary levy, by reference to an emergency of whose existence only he could judge.

[a] Summ's

[37] Cf. *El*., II v 5; *De C*., x 6; *Lev*., 96–7.

Militia of *England* is delivered to be, and always to have been the Antient Right of the Kings of *England*:[38] But there is also in the same Act a Proviso, that this shall not be Construed for a Declaration, that the King may Transport his Subjects, or compel them to march out of the Kingdom, nor is it, on the contrary declared to be unlawful.[39]

Ph. Why is not that also determined?

La. I can imagine cause enough for it, though I may be deceiv'd. We love to have our King amongst us, and not be Govern'd by Deputies,[40] either of our own, or another Nation: But this I verily believe, that if a Forraign Enemy should either invade us, or put himself into[a] a readiness to invade either *England*, *Ireland*, or *Scotland* (no Parliament then sitting) and the King send *English* Souldiers thither, the Parliament would give him thanks for it. The Subjects of those Kings who affect the Glory, and imitate the Actions of *Alexander* the Great, have not always the most comfortable lives, nor do such Kings usually very long enjoy their Conquests.[41] They March to and fro perpetually, as upon a Plank sustained only in the midst, and when one end rises, down goes the other.

Ph. 'Tis well. But where Souldiers (in the Judgment of the Kings Conscience) are indeed necessary, as in an insurrection, or [14] Rebellion at home; how shall the Kingdom be preserved without a considerable Army ready, and in pay? How shall Money be rais'd for this Army, especially when the want of publick Treas-

[38] 13 Car II st.1 c.6 (SR V 308–9) on which see *Beh*., 337–8 (EW VI 417–8). This was 'An Act declaring the sole Right of the Militia to be in [the] King and for the present ordering & disposing the same'. The statute noted that 'an Act is under consideracion for exercising the Militia with most safety and ease to the King and His People'. Existing arrangements depending on the King's prerogative powers were confirmed till March 25 1662; the principle of royal control was then reaffirmed by 14 Car II c.3 (SR V 358), an Act that H seems to have missed.

[39] 'Provided That neither this Act nor any matter or thing therein contained shall be deemed construed or taken to extend to the giving or declaring of any Power for the transporting of any the Subjects of this Realme or any way compelling them to march out of this Kingdome otherwise then by the Lawes of England ought to be done' (SR V 309). As H correctly noticed, the Act does not identify or expound the laws referred to.

[40] =representatives, substitutes.

[a] int

[41] Cf. *El*. II ix 9; *De C*., xiii 14; *Lev*., 174.

ure inviteth Neighbour Kings to incroach, and unruly Subjects to Rebel?

La. I cannot tell. It is matter of Polity,[42] not of Law; but I know, that there be Statutes express, whereby the King hath obliged himself never to Levy Money upon his Subjects without the consent of his Parliament.[43] One of which Statutes is. 25 *Ed*. I. *c*. 6. in these words, *We have granted for us, and our Heirs, as well to Arch-Bishops, Bishops, Abbots, and other Folk of the Holy Church, as also Earls, Barons, and to all the Commonalty of the Land, that for no Business from henceforth, we shall take such Aids, Taxes, or Prizes, but by the common Consent of the Realm*.[44] There is also another Statute of *Ed*. I. in these words, *No Taxes, or Aid shall be taken or Levyed by us, or our Heirs in our Realm, without the good will, and assent of the Arch-Bishops, Bishops, Earls, Barons, Knights, Burgesses, and other Freemen of the Land*;[45] which Statutes have been since that time Confirmed by divers other Kings, and lastly by the King that now Reigneth.[46]

Ph. All this I know, and am not satisfied. I am one of the Common People, and [15] one of that almost infinite number of Men, for whose welfare Kings, and other Soveraigns were by God Ordain'd: For God made Kings for the People, and not People for Kings. How shall I be defended from the domineering of Proud and Insolent Strangers that speak another Language, that scorn us, that seek to make us Slaves? Or how shall I avoid the Destruction that may arise from the cruelty of Factions in a Civil War, unless

[42] =practical statecraft.

[43] *Beh*. denied the existence of laws to this effect, conceding only that 'amongst the Statute Laws there is one called *Magna Charta* . . . in which there is one Article, wherein a King heretofore hath granted, That no man shall be distrained . . . otherwise than by the Law of the Land'; H explained away this solitary exception as 'securing of every Man from such as abused the King's power by surreptitious obtaining the King's Warrants' (*Beh*., 61: EW VI 210). Unless he was attempting a deception in which he was unlikely to succeed, this error must have stemmed from ignorance; it follows that he wrote the *Dialogue* later.

[44] SR I 123.

[45] Ibid., 125. An undated measure described in *Statutes at large* as 'a Statute concerning certaine liberties graunted by the King to his Commons' (Pulton, *Statutes at large*, 56), but normally referred to as De Tallagio non Concedendo; it was cited as such in the 1628 'Petition of Right', printed in statute books as 3 Car. I c.1 (SR V 23).

[46] Charles II had never in fact formally conceded this general principle. His closest approach to doing so was probably 12 Car. II c.4 §6 (SR V 182), which denied that customs duties could be levied without parliament's consent.

the King, to whom alone, you say, belongeth the right of Levying, and disposing of the Militia; by which only it can be prevented, have ready Money, upon all Occasions, to Arm and pay as many Souldiers, as for the present defence, or the Peace of the People shall be necessary? Shall not I, and you, and every Man be undone? Tell me not of a Parliament when there is no Parliament sitting, or perhaps none in being, which may often happen; and when there is a Parliament if the speaking, and leading Men should have a design to put down Monarchy, as they had in the Parliament which began to sit *Nov.* 3. 1640.[47] Shall the King, who is to answer to God Almighty for the safety of the People, and to that end is intrusted with the Power to Levy and to dispose of the Souldiery, be disabled to perform his Office by virtue of these Acts of Parliament which you have [16] cited? If this be reason, 'tis reason also that the People be Abandoned, or left at liberty to kill one another, even to the last Man; if it be not Reason, then you have granted it is not Law.

La. 'Tis true, if you mean *Recta Ratio,*[48] but *Recta Ratio* which I grant to be Law, as Sir *Edw. Coke* says, I *Inst. Sect.* 138. [49]Is an Artificial perfection of Reason gotten by long Study, Observation, and Experience, and not every Mans natural Reason; for *Nemo nascitur Artifex*.[50] This Legal Reason is *summa Ratio*;[51] and therefore, if all the Reason that is dispersed in so many several Heads were united into one, yet could he not make such a Law as the Law of *England* is, because by many Successions of Ages it hath been fined and refined, by an infinite number of Grave and Learned Men. And this is it he calls the Common-Law.

Ph. Do you think this to be good Doctrine? though it be true, that no Man is born with the use of Reason, yet all Men may grow up to it as well as Lawyers; and when they have applyed their Reason to the Laws (which were Laws before they Studyed them, or else it was not Law they Studied) may be as fit for, and capable of Judicature as Sir *Edw. Coke* himself, who whether he had more,

[47] The Long Parliament, which sat continuously until April 1653 and formally dissolved itself only in February 1660.

[48] 'Right Reason'.

[49] Quot. to 'Learned Men' (*First Inst.*, 97b). The words 'Artificial . . . Experience' are quoted at *Lev.*, 140.

[50] 'No one is born a Craftsman'.

[51] 'The highest Reason'.

or less use of Reason, was not thereby a Judge, but because [17] the King made him so: And whereas he says, that a Man who should have as much Reason as is dispersed into so many several Heads, could not make such a Law as this Law of *England* is; if one should ask him who made the Law of *England*;[a] Would he say a Succession of *English* Lawyers, or Judges made it, or rather a Succession of Kings; and that upon their own Reason, either solely, or with the Advice of the Lords and Commons in Parliament, without the Judges, or other Professors of the Law? You see therefore that the Kings Reason, be it more, or less, is that *Anima Legis*,[52] that *Summa Lex*,[53] whereof Sir *Edw. Coke* speaketh, and not the Reason, Learning, or Wisdom of the Judges; but you may see, that quite through his Institutes of Law, he often takes Occasion to Magnifie the Learning of the Lawyers, whom he perpetually termeth the Sages of the Parliament, or of the Kings Council:[54] therefore unless you say otherwise, I say, that the Kings Reason, when it is publickly upon Advice, and Deliberation declar'd, is that *Anima Legis*, and that *Summa Ratio*, and that Equity which all agree to be the Law of Reason, is all that is, or ever was Law in *England*, since it became Christian, besides the Bible.[55] [18]

La. Are not the Canons of the Church part of the Law of *England*, as also the Imperial Law used in the Admiralty, and the Customs of particular places, and the by-Laws of Corporations, and Courts of Judicature.

Ph. Why not? for they were all Constituted by the Kings of *England*; and though the Civil Law used in the Admiralty were at first the Statutes of the *Roman* Empire, yet because they are in force by no other Authority than that of the King, they are now the Kings Laws, and the Kings Statutes.[56] The same we may say of the

[a] ~ ?

[52] 'The Soul/Life of the law'.

[53] 'Highest Law'.

[54] Coke does sometimes refer to judges as 'Sages of the law' (at *Fourth Inst*., 72, for instance), but 'perpetually' is an exaggeration.

[55] Cf. *Lev*.: 'The Law of Nature, and the Civill Law, contain each other, and are of equall extent' (*Lev.,* 138).

[56] Cf. *De C*., xiv 5; *Lev*., 336. That alien law in England was the King of England's law was not in itself a controversial statement. In Coke's opinion, 'albeit the Kings of England derived their ecclesiastical laws from others, yet so many as were proved, approved and

Canons; such of them as we have retained, made by the Church of *Rome*, have been no Law, nor of any force in *England*, since the beginning of Queen *Elizabeth*'s Raign, but by Virtue of the Great Seal of *England*.[57]

La. In the said Statutes that restrain the Levying of Money without consent of Parliament, Is there any thing you can take exceptions to?

Ph. No, I am satisfied that the Kings that grant such Liberties are bound to make them good, so far as it may be done without sin: But if a King find that by such a Grant he be disabled to protect his Subjects if he maintain his Grant, he sins; and therefore may, and ought to take no Notice [19] of the said Grant: For such Grants as by Error, or false Suggestion are gotten from him, are as the Lawyers do Confess, Void and of no Effect, and ought to be recalled.[58] Also the King (as is on all hands Confessed) hath the Charge lying upon him to Protect his People against Forraign Enemies, and to keep the Peace betwixt them within the Kingdom; if he do not his utmost endeavour to discharge himself thereof, he Committeth a Sin, which neither King, nor Parliament can Lawfully commit.[59]

La. No Man I think will deny this: For if Levying of Money be necessary, it is a Sin in the Parliament to refuse, if unnecessary,[a] it is a sin both in King and Parliament to Levy: But for all that it may be, and I think it is a Sin in any one that hath the Soveraign Power, be he one Man, or one Assembly, being intrusted with the safety of a whole Nation, if rashly, and relying upon his own

allowed here, by and with a general consent, are aptly and rightly called, the King's ecclesiastical laws of England' (Coke, *Fifth Reports*, Caudrey's case, 9a: ER LXXVII 11).

[57] The Act for the submission of the clergy (25 Henry VIII c.19; SR III 460–1) had envisaged a reform of canon law, ending with ratification by the Great Seal of all surviving Roman principles; in fact, however, this had never happened, and so the English monarchy had never formally endorsed the canons it inherited from the medieval church.

[58] Noy, *Compleat lawyer*, 37. H may have been thinking particularly of *Third Inst*., 236, where charters of pardon are said to be void if based on false suggestion.

[59] *Lev*., 113 states that 'If a Monarch, or Soveraign Assembly, grant a Liberty to all, or any of his Subjects, which Grant standing, he is disabled to provide for their safety, the Grant is voyd; unlesse he directly renounce, or transferre the Soveraignty to another . . . it is to be understood it was not his will; but that the Grant proceeded from ignorance of the repugnancy between such a Liberty and the Soveraign Power.' This suggests the stronger thesis that grants of this type are always and utterly void.

[a] ∼.

Natural sufficiency, he make War, or Peace without Consulting with such, as by their Experience and Employment abroad, and Intelligence by Letters, or other means have gotten the Knowledge in some measure of the strength, Advantages and Designs of the Enemy, and the Manner and Degree of the Danger that may from thence arise.[60] In like man-[20]ner, in case of Rebellion at Home, if he consult not with [men] of Military Condition, which if he do, then I think he may Lawfully proceed to Subdue all such Enemies and Rebels; and that the Souldiers ought to go on without Inquiring whether they be within the Country, or without: For who shall suppress Rebellion, but he that hath Right to Levy, Command, and Dispose of the Militia? The last long Parliament denied this. But why? Because by the Major part of their Votes the Rebellion was raised with design to put down Monarchy, and to that end Maintained.

Ph. Nor do I hereby lay any Aspersion upon such Grants of the King and his Ancestors. Those Statutes are in themselves very good for the King and People, as creating some kind of Difficulty for[a] such Kings as for the Glory of Conquest might spend one part of their Subjects Lives and Estates, in Molesting other Nations, and leave the rest to Destroy themselves at Home by Factions. That which I here find fault with, is the wresting of those, and other such Statutes to a binding of our Kings from the use of their Armies in the necessary defence of themselves and their People. The late long Parliament that in 1648,[61] Murdered their King (a King that sought no greater Glory upon Earth, but [21] to be indulgent to his People, and a Pious defender of the Church of *England*) no sooner took upon them the Soveraign Power, then they Levyed Money upon the People at their own Discretion. Did any of their Subjects Dispute their Power? Did they not send Souldiers over the Sea to Subdue *Ireland*,[62] and others to Fight against the Dutch at Sea,[63] or made they any

[60] H may be toning down his real antipathy to parliaments. He had earlier contrasted the rational practice of taking advice from individual experts within the area of their expertise with the counterproductive expedient of collecting them together in a council (Cf. *De C.*, x 10; *Lev*., 96, 135–6).

[a] , or

[61] 30 January 1648/9 (H dates the year from 25 March).

[62] In August 1649; English troops were stationed in Ireland down to the Restoration.

[63] The First Dutch War (May 1652–April 1654).

doubt but to be obeyed in all that they Commanded, as a Right absolutely due to the Soveraign Power in whomsoever it resides? I say[a] not this as allowing their Actions, but as a Testimony from the Mouths of those very Men that denyed the same Power to him, whom they acknowledged to have been their Soveraign immediately before, which is a sufficient Proof, that the People of *England* never doubted of the Kings Right to Levy Money for the Maintenance of his Armies, till they were abused in it by Seditious Teachers, and other prating Men, on purpose to turn the State and Church into Popular Government, where the most ignorant and boldest Talkers do commonly obtain the best preferments;[64] again, when their New Republick returned into Monarchy by *Oliver*, who durst deny him Money upon any pretence of *Magna Charta*, or of these other Acts of Parliament which you have Cited?[65] You may therefore think it good Law, for [22] all your Books; that the King of *England* may at all times, that he thinks in his Conscience it will be necessary for the defence of his People, Levy as many Souldiers, and as much Money as he please, and that himself is Judge of the Necessity.

La. Is there no body harkning at the door?

Ph. What are you afraid of?

La. I mean to say the same that you say: but there be very many yet, that hold their former Principles, whom, neither the Calamities of the Civil Wars, nor their former Pardon[66] have throughly cur'd of their Madness.

Ph. The Common People never take notice of what they hear of this Nature, but when they are set on by such as they think Wise; that is, by some sorts of Preachers, or some that seem to be Learned in the Laws, and withal speak evil of the Governors. But what if the King upon the sight, or apprehension of any great danger to

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[64] Cf. *El*., II ii 5; *De C*., x 7; *Lev*., 96–7.

[65] Cromwell became Lord Protector and possessor of a quasi-monarchical power on 16 Dec. 1653. Contrary to what H implies, some of his subjects openly denied that he was entitled to tax without consent; a test case was brought by a merchant named George Cony in 'Upper' [King's] Bench in 1655. But the upshot was what H would have expected; Cromwell imprisoned Cony and his lawyers until their resistance collapsed (Gardiner, *Commonwealth and Protectorate*, III 298–302).

[66] 'An Act of Free and General Pardon Indempnity and Oblivion' of 1661 (12 Car II c.11: SR V 226–34), a measure discussed by H at pp. 39–40 below.

his People; as when their Neighbours are born down with the Current of a Conquering Enemy, should think his own People might be involved in the same Misery, may he not Levy, Pay, and Transport Souldiers to help those weak Neighbours by way of prevention, to save his own People and himself from Servitude? Is that a sin? [23]

La. First, If the War upon our Neighbours be Just, it may be question'd whether it be Equity or no to Assist them against the Right.

Ph. For my part I make no Question of that at all, unless the Invader will, and can put me in security, that neither he, nor his Successors shall make any Advantage of the Conquest of my Neighbour, to do the same to me in time to come; but there is no Common Power to bind them to the Peace.

La. Secondly; when such a thing shall happen, the Parliament will not refuse to Contribute freely to the safety of themselves, and the whole Nation.

Ph. It may be so, and it may be not: For if a Parliament then sit not, it must be called; that requires 6 Weeks time; Debating and Collecting what is given requires as much, and in this time the Opportunity perhaps is lost. Besides, how many wretched Souls have we heard to say in the late Troubles; What matter is it who gets the Victory? We can pay but what they please to Demand, and so much we pay now: and this they will Murmur, as they have ever done whosoever shall Raign over them, as long as their Coveteousness and Ignorance hold together, which will be till Dooms-day[a], if better order be not taken for their [24] [In]struction[b] in their Duty, both from Reason and Religion.

La. For all this I find it somewhat hard, that a King should have Right to take from his Subjects, upon the pretence of Necessity what he pleaseth.

Ph. I know what it is that troubles your Conscience in this Point. All Men are troubled at the Crossing of their Wishes; but it is our own fault. First, we wish Impossibilities; we would have our Security against all the World, upon Right of Property, without Paying for it: This is Impossible. We may as well Expect that Fish, and Fowl should Boil, Rost, and Dish themselves, and

[a] Interlinear hyphen.

[b] First syllable supplied from catchword: 'In-'.

come to the Table; and that Grapes should squeeze themselves into our Mouths, and have all other the Contentments and ease which some pleasant[67] Men have Related of the land of *Cocquany*.[68] Secondly, There is no Nation in the World where he, or they that have the Soveraignty do not take what Money they please, for Defence of those respective Nations, when they think it necessary for their safety. The late long Parliament denyed this; but why? Because there was a Design amongst them to Depose the King. Thirdly, There is no Example of any King of *England* that I have Read of, that ever pretended any such Necessity for Levying of Money, against [25] his Conscience. The greatest summs[a] that ever were Levyed (Comparing the value of Money, as it was at that time, with what now it is) were Levied by King *Edw*. 3d. and King *Henry* the 5th. Kings of whom we Glory now, and think their Actions great Ornaments to the *English* History.[69] Lastly, As to the enriching of now and then a Favourite, it is neither sensible to the Kingdom,[70] nor is any Treasure thereby Conveyed out of the Realm, but so spent as it falls down again upon the Common People.[71] To think that our Condition being Humane should be subject to no Incommodity, were Injuriously to Quarrel with God Almighty for our own Faults; for he hath done his part in annexing [a reward to][b] our own Industry and Obedience.

[67] =amusing, lighthearted, facetious.

[68] More often 'Cockaigne': an imagined land of plenty.

[a] sounds

[69] Sir Mathew Hale's 'Reflections' commented: 'they write and speak at randome that tell us the two most eminent kinges of this Realme Edward the 3^{d} and H 5 tooke the greatest freedome in impositions upon theyre Subjects. For hee that is but little conversant wth the parliament Rolls of Historyes of those kinges will finde that though they did great thinges yet [it: deleted] was theyre warres and armyes maintained by parliamentary supplyes and those kinges had the fewest of parliamentary imposition[s] of any that preceded or succeeded them' (Lambeth MS 3479, fo.78).

[70] =the Kingdom does not feel it.

[71] Cf. *El*., II v 5; *De C*., x 6; *Lev*., 96–7.

[b] The unexpanded text embodies the impeccably Calvinist thought that industry and obedience are themselves a gift from God, while our faults must be regarded as our own. H might conceivably have written this, but both the argument and its expression are odd and uncharacteristic; elsewhere in his writings, in English and in Latin, he prefers to speak of annexing x *to* y. Cf. *Lev*.'s account of 'natural punishments': 'he that will do any thing for his pleasure, must engage himselfe to suffer all the pains annexed to it' (*Lev*., 193). In this case, the *reward* annexed would be a state of peace.

La. I know not what to say.

Ph. If you allow this that I have said; then, say that the People never were, shall be, or ought to be free from being Taxed at the will of one or other; being hindred, [in] that if Civil War come, they must Levy all they have, and that Dearly, from the one, or from the other, or from both sides.[a] Say, that adhering to the King, their Victory is an end of their Trouble; that adhering to his Enemies there is no end; for the War will continue by a perpetual Subdivision, and when it ends, they will be in the same [26] Estate they were before. That they are often Abused by Men who to them seem wise, when then their Wisdom is nothing else but Envy to those that are in Grace, and in profitable Employments, and that those Men do but abuse the Common People to their own ends, that set up a private Mans Propriety against the publick Safety. But say withal, that the King is Subject to the Laws of God, both Written, and Unwritten, and to no other; and so was *William the Conqueror*, whose Right is[b] all Descended to our present King.[72]

La. As to the Law of Reason, which is Equity, 'tis sure enough there is but one Legislator, which is God.

Ph. It followeth then that which you call the Common-Law, Distinct from Statute-Law, is nothing else but the Law of God.

La. In some sense it is, but it is not Gospel, but Natural Reason, and Natural Equity.

[a] Like *Ph*.'s previous sentence, this appears to be corrupt, but emendation should be very cautious. Suspicion centres on 'being hindred' and 'Levy', but both embody analogous inversions of the conventional wisdom. Hobbesian liberty is absence of hindrance ('a FREEMAN, is he, that . . . is not hindred to doe what he has a will to': *Lev*., 108), but the state of war is full of hindrances. In peace, kings levy money from their subjects' property; in war, the subjects do the 'levying', in that they lose control of all their goods and need to ask for them to be returned.

[b] it

[72] The *Dialogue* is the only work in which H attaches importance to the historical fact of William's conquest. *Beh*. says 'by right of a descent continued above 600 years' down to 1640 (*Beh*., 2; EW VI 165–6); if the figure 600 is taken literally, it implies that the Duke was no conqueror, but the legitimate heir of Edward the Confessor. *Lev*. casually refers to 'a descent of 600 years' (*Lev*., 95), but in general it discourages attention to the historical origins of states: 'as if, for example, the Right of the Kings of England did depend on the goodnesse of the cause of *William* the Conquerour, and upon their lineall, and directest Descent from him' (ibid., 391).

Ph. Would you have every Man to every other Man alledge for Law his own particular Reason? There is not amongst Men an Universal Reason agreed upon in any Nation, besides the Reason of him that hath the Soveraign Power;[73] yet though his Reason be but the Reason of one Man, yet it is set up to supply the place of that [27] Universal Reason, which is expounded to us by our Saviour in the Gospel, and consequently our King is to us the Legislator both of Statute-Law, and of Common-Law.

La. Yes, I know that the Laws Spiritual, which have been Law in this Kingdom since the Abolishing of Popery, are the Kings Laws, and those also that were made before; for the Canons of the Church of *Rome* were no Laws, neither here, nor any where else without the Popes Temporal Dominions, farther than Kings, and States in their several Dominions respectively did make them so.

Ph. I grant that. But you must grant also, that those Spiritual Laws [abroad were made by][a] Legislators of the Spiritual Law; and yet not all Kings, and States make Laws by Consent of the Lords and Commons; but our King here is so far bound to their Assents, as he shall Judge Conducing to the Good, and safety of his People; for Example, if the Lords and Commons should Advise him to restore those Laws Spiritual, which in Queen *Maries* time were in Force, I think the King were by the Law of Reason obliged, without the help of any other Law of God, to neglect such Advice.

La. I Grant you that the King is sole Legislator, but with this Restriction, that if [28] he will not Consult with the Lords of Parliament and hear the Complaints, and Informations of the Commons, that are best acquainted with their own wants, he sinneth against God, though he cannot be Compell'd to any thing by his Subjects by Arms, and Force.[74]

[73] Cf. *El*., II x 8; *De C*., xiv 17; *Lev*., 19.

[a] *Ph*. must be expressing a more extreme position than *La*.'s view that canon law is made by the secular state. If the proposed addition is correct, his point is that the canon law is valid even when made by monarchs who make laws without consent. He goes on to concede ('but our King . . . ') that English Kings are bound to take their subjects' good advice. *Moral works* and EW both suggest 'were made by'. Cropsey prefers 'were enacted in England by consent of the Lords and Commons assenting in the Kings' actions as sole'.

[74] At *Lev*., 184–5 H stresses the importance of hearing complaints in rather similar phrasing; he deplores the claim, however, that nobles have a right to be consulted.

Ph. We are Agreed upon that already;[a] since therefore the King is sole Legislator, I think it also Reason he should be sole Supream Judge.

La. There is no doubt of that; for otherwise there would be no Congruity of Judgments with the Laws. I Grant also that he is the Supream Judge over all Persons, and in all Causes Civil, and Ecclesiastical within his own Dominions,[75] not only by Act of Parliament at this time, but that he has ever been so by the Common-Law: For the Judges of both the Benches[76] have their Offices by the Kings Letters Patents, and so (as to Judicature) have the Bishops. Also the Lord Chancellour hath his Office by receiving from the King the Great Seal of *England*; and to say all at once, there is no Magistrate, or Commissioner for Publick Business, neither of Judicature, nor Execution in State, or Church, in Peace, or War, but he is made so by Authority from the King. [29]

Ph. 'Tis true; But perhaps you may think otherwise, when you Read such Acts of Parliament, as say, that the King shall have Power and Authority to do this, or that by Virtue of that Act, as *Eliz. c*. 1. [77]That your Highness, your Heirs, and Successors, Kings, or Queens of this Realm shall have full Power and Authority, by Virtue of this Act, by Letters Patents under the Great Seal of *England* to Assign, *&c*. Was it not this Parliament that gave this Authority to the Queen?

La. No; For the Statute in this Clause is no more than (as Sir *Edw. Coke* useth to speak) an Affirmance of the Common-Law;[78] for she being Head of the Church of *England* might make Commissioners for the deciding of Matters Ecclesiastical, as freely as if

[a] ~,

[75] Marginal note: 'The King is the Supream Judge.' See Illustration 5.

[76] The courts of King's Bench and Common Pleas.

[77] Quot. to 'Assign, *&c*.' (1 Eliz. c.1 §8: SR IV 352). The famous clause H quotes confers authority upon the monarch to nominate commissioners to exercise 'all manner of Jurisdictions Privileges and Preheminences in any wise touching or concerning any Spiritual or Ecclesiastical Jurisdiction' and to 'visite refourme redres order correcte and amende all such Erroures Heresies Schismes Abuses Offences Contemptes and Enormities whatsoever' within the scope of such a jurisdiction. It is discussed below (p. 99).

[78] Coke frequently treats statutes as 'confirmations' of the common law. In his report on Caudrey's case, printed as *De jure regis ecclesiastico* at the start of his *Fifth Reports*, he argued that this very clause simply confirmed existing royal power (5 Coke: De jure regis ecclesiastico, 8a–b: ER LXXVII 10).

he will not Conſult with the Lords of Parliament and hear the Complaints, and Informations of the Commons, that are beſt acquainted with their own wants, he ſinneth againſt God, though he cannot be Compell'd to any thing by his Subjects by Arms, and Force.

Ph. We are Agreed upon that already, ſince therefore the King is ſole Legiſlator, I think it alſo Reaſon he ſhould be ſole Supream Judge.

La. There is no doubt of that; for otherwiſe there would be no Congruity of Judgments with the Laws. I Grant alſo that he is the Supream Judge over all Perſons, and in all Cauſes Civil, and Eccleſiaſtical within his own Dominions, not only by Act of Parliament at this time, but that he has ever been ſo by the Common-Law: For the Judges of both the Benches have their Offices by the Kings Letters Patents, and ſo (as to Judicature) have the Biſhops. Alſo the Lord Chancellour hath his Office by receiving from the King the Great Seal of *England*; and to ſay all at once, there is no Magiſtrate, or Commiſſioner for Publick Buſineſs, neither of Judicature, nor Execution in State, or Church, in Peace, or War, but he is made ſo by Authority from the King.

The King is the Supream Judge.

Ph.

4490 cc 33 Bodleian Oxford

Page 28 of *A Dialogue*

she had been Pope, who did you know pretend[79] his Right from the Law of God.

Ph. We have hitherto spoken of Laws without considering any thing of the Nature and Essence of a Law; and now unless we define the word Law, we can go no farther without Ambiguity, and Fallacy, which will be but loss of time; whereas, on the contrary, the Agreement upon our words will enlighten all we have to say hereafter.

La. I do not remember the Definition of Law in any Statute. [30]

Ph. I think so: For the Statutes were made by Authority, and not drawn from any other Principles than the care of the safety of the People. Statutes are not Philosophy as is the Common-Law, and other disputable Arts, but are Commands, or Prohibitions which ought to be obeyed, because Assented to by Submission made to the Conqueror here in *England*,[80] and to whosoever had the Soveraign Power in other Common wealths; so that the Positive Laws of all Places are Statutes. The Definition of Law was therefore unnecessary for the makers of Statutes, though very necessary to them, whose work it is to Teach the sence of the Law.

La. There is an Accurate Definition of a Law in *Bracton*, Cited by Sir *Edw. Coke* ([*Second Inst*., 588]) *Lex est sanctio justa, jubens honesta, & prohibens contraria*.[81]

Ph. That is to say, Law is a just Statute, Commanding those things which are honest, and Forbidding the contrary. From whence it followeth, that in all Cases it must be the Honesty, or Dishonesty that makes the Command a Law, whereas you know that but for the Law we could not (as saith St. *Paul*)[82] have known what is sin; therefore this Definition is no Ground at all for any farther Discourse of Law. Besides, you know the Rule of Honest, and [31] Dishonest refers to Honour,[83] and that it is Justice only, and Injustice that the Law respecteth. But that which I most except

[79] =claim.

[80] See p. 25 n.72 above.

[81] Bracton, *De legibus*, 2r; *Second Inst*., 588.

[82] 'I had not known sin, but by the law' (*Romans* vii 7).

[83] '*Honourable* is whatsoever possession, action, or quality, is an argument and signe of Power' (*Lev*., 44); the 'Lawes of Honour', the principles that restrain societies at war with one another, are 'to abstain from cruelty, leaving to men their lives, and instruments of husbandry' (*Lev*., 85; for a slightly different account, cf. *El*. I xix 2).

against in this Definition, is, that it supposes that a Statute made by the Soveraign Power of a Nation may be unjust. There may indeed in a Statute Law, made by Men be found Iniquity, but not Injustice.[84]

La. This is somewhat subtil; I pray deal plainly, what is the difference between Injustice and Iniquity?

Ph. I pray you tell me first, what is the difference between a Court of Justice, and a Court of Equity?

La. A Court of Justice is that which hath Cognizance of such Causes as are to be ended by the Positive[a] Laws of the Land; and a Court of Equity is[b] that, to which belong such Causes as are to be determined by Equity; that is to say, by the Law of Reason.

Ph. You see then that the difference between Injustice, and Iniquity is this; that Injustice is the Transgression of a Statute-Law, and Iniquity the Transgression of the [Common-Law, which][c] was nothing else but the Law of Reason, and that the Judges of that Law are Courts of Justice, because the breach of the Statute-Law is Iniquity, and Injustice also.[85] But perhaps you mean by Common-Law, not the Law it self [32], but the manner of proceeding in the Law (as to matter of Fact) by 12 Men, Free-holders,[d] though those 12 Men are no Court of Equity, nor of Justice, because they determine not what is Just, or Unjust, but only whether it be done, or not done;[86] and their Judgment is nothing

[84] Cf. *El*., II ii 3, ix 1; *De C*., vii 14; *Lev*., 90, 109.

[a] Positive

[b] in

[c] < Law of Reason > Three considerations converge to recommend this emendation: (i) 'the transgression of a Statute-Law' is naturally contrasted with the transgression of a common law; (ii) the later reference to 'Common-Law' suggests that the phrase has recently been used; and (iii) H frequently reminds the reader of Coke's belief that common law is reason, and actually says 'the Common-Law (which is the Law of Reason)' at p. 122 below.

[85] If the above emendation is sound, 'that Law' is common law (if it is not, the phrase is likely to refer to 'the Law of Reason', which comes to the same thing). The argument appears to run as follows: H has equated common law with reason/equity and 'justice' with observance of positive law; he now explains that courts of common law (equity) are nonetheless courts of justice (positive law). Judges of common law can deal with breaches of positive law, as any disobedience to the latter is a breach of the natural law of covenant-keeping. Cf. *Lev*.'s maxim that 'The Law of Nature, and the Civill Law, contain each other, and are of equall extent' (*Lev*., 138).

[d] Interlinear hyphen.

[86] Contrast *Lev*., 146, where juries are said to be judges 'not onely of the Fact, but also of the Right'.

else but a Confirmation of that which is properly the Judgment of the Witnesses; for to speak exactly there cannot possibly be any Judge of Fact besides the Witnesses.[87]

La. Seeing all Judges in all Courts ought to Judge according to Equity, which is the Law of Reason, a distinct Court of Equity seemeth to me to be unnecessary, and but a Burthen to the People, since Common-Law, and Equity are the same Law.

Ph. It were so indeed; If Judges could not err, but since they may err, and that the King is not Bound to any other Law but that of Equity, it belongs to him alone to give Remedy to them that by the Ignorance, or Corruption of a Judge shall suffer dammage.

La. How would you have a Law defin'd?[a]

Ph. Thus; A Law is the Command of him, or them that have the Soveraign Power, given to those that be his or their Subjects, declaring Publickly, and plainly what every[88] of them may do, and what they must forbear to do. [33]

La. By your Definition of a Law, the Kings Proclamation under the Great Seal of *England* is a Law; for it is a Command, and Publick, and of the Soveraign to his Subjects.[89]

Ph. Why not? If he think it necessary for the good of his Subjects: For this is a Maxim at the Common-Law Alledged by Sir *Edward Coke* himself. 2[b] *Inst*. [c] 306. *Quando Lex aliquid concedit, concedere videtur & id per quod devenitur ad illud*.[90] And you know

[87] Few if any early modern common lawyers would have accepted this; in principle juries were judges of the facts whether or not they heard some testimony. Coke actually distinguished between trial 'by witnesses' and trial 'by jury' (*Third Inst*., 26–7). Though it is true that witnesses were playing a growing role in criminal trials, juries remained entitled to draw on their personal knowledge in reaching a verdict. As late as 1670, in his famous judgment upon Bushel's case, H's friend Sir John Vaughan successfully maintained that juries could base their decisions on information never produced in court; it followed that no judge could punish them for verdicts that defied a judicial direction (Vaughan 147; ER CXXIV 1012).

[a] In copy-text, this question and *Ph*'s answer is found before the previous exchange (between 'the Witnesses' and 'Seeing all Judges'). The emendation (Cropsey's) restores them to their logical position.

[88] =each (cf. *Lev*., 137).

[89] Cf. *Answer to Bramhall*, 113–4 (EW IV 370) and see below, p. 139.

[b] 1

[c] < *Sect*. > *First Inst*. (unlike *Second*) has numbered sections. Somebody who thought that the (correct) page reference was to the earlier work might well assume that '306' was in fact a section number.

[90] 'When the law allows something, it seems to allow also the means by which that thing has come about.'

out of the same Author, that divers Kings of *England* have often, to the Petitions in Parliament which they granted, annexed such exceptions as these, unless there be necessity, saving our Regality;[91] which I think should be always understood, though they be not expressed; and are understood so by Common Lawyers,[92] who agree that the King may recall any Grant wherein he was deceiv'd.

La. Again, whereas you make it of the Essence of a Law to be Publickly and plainly declar'd to the People, I see no necessity for that. Are not all Subjects Bound to take notice of all Acts of Parliament, when no Act can pass without their Consent?

Ph. If you had said that no Act could pass without their knowledge, then indeed they had been bound to take notice of them; but none can have knowledge of them but [34] the Members of the Houses of Parliament, therefore the rest of the People are excus'd; or else the Knights of the Shires[a] should be bound to furnish People with a sufficient Number of Copies (at the Peoples Charge) of the Acts of Parliament at their return into the Country; that every man may resort to them, and by themselves, or Friends take notice of what they are obliged to; for otherwise it were Impossible they should be obeyed: And that no Man is bound to do a thing Impossible is one of Sir *Edw. Cokes* Maxims at the Common-Law.[93] I know that most of the Statutes are Printed, but it does not appear that every Man is bound to Buy the Book of Statutes, nor to search for them at *Westminster* or at the *Tower*,[94] nor to understand the Language wherein they are for the most part Written.[95]

La. I grant it proceeds from their own Faults; but no Man can be excused by the Ignorance of the Law of Reason; that is to say, by Ignorance of the Common-Law, except Children, Mad-men, and Idiots: But you exact such a notice of the Statute-Law, as is almost Impossible. Is it not enough that they in all Places have a sufficient number of the Poenal Statutes?

[91] See below, pp. 60–1, 130

[92] See above, p. 20 n.58.

[a] Copy-text prints 'Sheirs', but BL 884.k.5 and some other copies have 'Shires'. This is the only variant between copies arising from deliberate intervention.

[93] *First Inst*., 92a.

[94] The possible locations of legal records.

[95] Latin and Norman French.

Ph. Yes; If they have those Poenal Statutes near them, but what Reason can you give me why there should not be as many [35] Copies abroad of the Statutes, as there be of the Bible?

La. I think it were well that every Man that can Read had a Statute-Book; for certainly no knowledge of those Laws, by which Mens Lives and Fortunes can be brought into danger, can be too much. I find a great Fault in your Definition of Law; which is, that every Law either forbiddeth or Commandeth something. 'Tis true that the Moral-Law[96] is always a Command or a Prohibition, or at least Implieth it; but in the Levitical-Law, where it is said; that he that Stealeth a Sheep shall Restore four Fold;[97] what Command, or Prohibition lyeth in these words?

Ph. Such Sentences as that are not in themselves General, but Judgments;[a] nevertheless, there is in those words Implied a Commandment to the Judge, to cause to be made a Four-fold Restitution.[98]

La. That's Right.

Ph. Now Define what Justice is, and what Actions, and Men are to be called Just.

[96] Theologians used the phrase 'the moral law' to refer to that part of God's law for the Jews that continues to be binding everywhere (i.e. that overlaps with natural law), in contrast to the 'ceremonial' and 'judicial' laws. H liked to point out that natural law was 'moral' (from the Latin *mores*=customs, manners), on the grounds that it concerned 'mens manners and conversation one towards another' (*El.*, I xviii 1; cf. *De C.*, iii 31, *De H.*, xiii 9).

[97] *Exodus* xxii 1; alluded to II *Samuel* xii 6.

[a] ∼,

[98] *Lev.* distinguishes 'distributive' laws, addressed to every subject and defining private rights at positive law, from 'penal' laws defining punishments, addressed 'to publique Ministers appointed to see the Penalty executed. And these Penal Lawes are for the most part written together with the Lawes Distributive; and are sometimes called Judgements' (*Lev.*, 148; cf. *El.*, II x 6). *Lat. Lev.* states: 'Distributivae sunt, quibus Iura Civium definiuntur; quaeque Civibus praescribuntur universis. [New line] Poenales sunt quae poenas violatoribus Legum infligendas definiunt; quaeque Ministros quorum officium est poenas exequi solos alloquuntur, et cum Legibus Distributivis conjunguntur' [Distributive laws are those by which the rights of subjects are defined; and which are prescribed to the whole citizen body. Penal laws are those which define the pains to be inflicted on violators of the law; and which are addressed to the officers alone, whose duty is to implement the pains, and which are joined together with the distributive laws] (*Lat. Lev.*, 135: OL III 207). *De C.* held that 'distributive' (*distributiva*) and 'vindicative, or penal' (*vindicativa, sive poenaria*) were properly not labels for different types of law, but the inseparable parts of every positive law (*De C.*, xiv 6–7).

La. Justice is the constant will of giving to every Man his own;[99] that is to say, of giving to every Man that which is his Right, in such manner as to Exclude the Right of all Men else to the same thing. A Just Action is that which is not against the Law. [36] A Just Man is he that hath a constant Will to live Justly;[100] if you require more, I doubt[101] there will no Man living be Comprehended within the Definition.

Ph. Seeing then that a Just Action (according to your Definition) is that which is not against the Law; it is Manifest that before there was a Law, there could be no Injustice, and therefore Laws are in their Nature Antecedent to Justice and Injustice, and you cannot deny but there must be Law-makers, before there were[a] any Laws, and Consequently before there was any Justice, I speak of Humane Justice; and that Law-makers were before that which you call Own, or property of Goods, or Lands distinguished by *Meum, Tuum, Alienum*.[102]

La. That must be Granted; for without Statute-Laws, all Men have Right to all things; and we have had Experience when our Laws were silenced by Civil War,[103] there was not a Man, that of any Goods could say assuredly they were his own.

Ph. You see then that no private Man can claim a Propriety in any Lands, or other Goods from any Title, from any Man, but the King, or them that have the Soveraign Power; because it is in virtue of the Soveraignty, that every Man may not enter [37] into, and Possess what he pleaseth; and consequently to deny the Soveraign any thing necessary to the sustaining of his Soveraign power, is to destroy the Propriety he pretends to. The next thing I will ask you is, how you distinguish between Law and Right, or *Lex* and *Jus*.

La. Sir *Ed. Coke* in divers places makes *Lex* and *Jus* to be the same, and so *Lex Communis*, and *Jus Commune*[b] to be all one; nor do I find that he does in any places distinguish them.

[99] See above, p.13.

[100] Like Aristotle, H always insisted a man does not cease to be just because he commits the occasional unjust action (*Lev*., 74; *De C.,* iii 5; *El*., I xvi 4).

[101] =I am sure.

[a] was

[102] See above, pp. 13–14.

[103] 'It is a proverbial saying, *inter arma silent leges* [amid arms the laws are silent]' (*El*., I xix 2).

[b] *Communis*

Ph. Then will I distinguish them, and make you judge whether my distinction be not necessary to be known by every Author of the Common Law: for Law obligeth me to do, or forbear the doing of something; and therefore it lies upon me an Obligation; but my Right is a Liberty left me by the Law to do any thing which the Law forbids me not, and to leave undone any thing which the Law commands me not.[104] Did Sir *Ed. Coke* see no difference between being bound and being free?[105]

La. I know not what he saw[a], but he has not mention'd it, though a man may dispense with his own Liberty, that cannot do so with the Law.

Ph. But what are you better for your Right, if a rebellious Company at home, or an Enemy from abroad take away the Goods, [38] or dispossess you of the Lands you have a right to? Can you be defended, or repair'd, but by the strength and authority of the King? What reason therefore can be given by a man that endeavours to preserve his Propriety, why he should deny, or malignly contribute to the Strength that should defend him, or repair him? Let us see now what your Books say to this point, and other points of the Right of Soveraignty. *Bracton*, the most authentick Author of the Common Law, *fol*. 55. saith thus: *Ipse Dominus Rex habet omnia Jura in manu suâ, est Dei Vicarius; habet ea quae sunt Pacis, habet etiam coercionem ut Delinquentes puniat; habet in potestate suâ Leges; nihil enim prodest Jura condere, nisi sit qui Jura tueatur*.[106] That is to say, our Lord the King hath all Right in his

[104] Cf. *El*., II x 5; *De C*., xiv 3; *Lev*., 64.

[105] A common etymology derived *lex* (law) from *ligare* (to bind). Cf. Fortescue, *De laudibus*, 31; St German, *Dr and Student*, 27.

[a] was

[106] A composite quotation. Phrases reproduced have been italicised: 'Et sciendum quod *ipse dominus Rex*, qui ordinariam habet jurisdictionem & dignitatem & potestatem super omnes qui in regno suo sunt, *habet enim omnia jura in manu sua,* quae ad coronam & laicalem pertinent potestatem & materialem gladium, qui pertinet ad regni gubernaculum, habet etiam iustitiam, & iudicium quae sunt jurisdictiones, ut ex jurisdictione sua, sicut dei minister et vicarius, tribuat unicuique quod suum fuerit. *Habet* etiam *ea quae sunt pacis*, ut populus sibi traditus in pace sileat & quiescat, & ne quis alterum verberet, vulneret, vel male tractet, ne quis alienam rem per vim & roberiam auferat vel asportet, ne quis hominem mahemiet vel occidat. *Habet etiam coertionem*, *ut delinquentes puniat* & coerceat. Item habet *in potestate sua leges*, & constitutiones, & assisas in regno suo provisas & approbatas, & juratas, ipse in propria persona sua observet, & a subditis suis faciat observari. *Nihil enim prodest iura condere nisi sit qui jura tueatur* (Bracton, *De legibus*, 55v).

own Hands; is Gods Vicar; he has all that concerns the Peace; he has the power to punish Delinquents; all the Laws are in his power; To make Laws is to no purpose, unless there be somebody to make them obeyed. If *Bracton's* Law be Reason, as I, and you think it is; what temporal power is there which the King hath not? Seeing that at this day all the power Spiritual which *Bracton* allows the *Pope*, is restored to the Crown; what is there that the King cannot do, excepting sin against the Law of God? The same *Bracton Lib.* 1[a].[39] *c.* 8. saith thus; *Si autem a Rege petitur (cum Breve non currat*[b] *contra ipsum) locus erit supplicationi, quod factum suum corrigat, & emendet; quod quidem si non fecerit, satis sufficit [ei] ad poenam, quod Dominum expectet Ultorem; nemo quidem de factis ejus praesumat disputare, multo fortius contra factum ejus venire*:[107] That is to say, if any thing be demanded of the King (seeing a Writ lyeth not against him) he is put to his Petition, praying him to Correct and Amend his own Fact; which if he will not do, it is a sufficient Penalty for him, that he is to expect a punishment from the Lord: No Man may presume to dispute of what he does, much less to resist him. You see by this, that this Doctrine concerning the Rights of Soveraignty so much Cryed down by the long Parliament, is the Antient Common-Law, and that the only Bridle of the Kings of *England*, ought to be the fear of God. And again *Bracton*, *c.* 24. of the second Book sayes, That the Rights of the Crown cannot be granted away; *Ea vero quae Jurisdictionis & Pacis, & ea quae sunt Justitiae & Paci annexa, ad nullum pertinent, nisi ad Coronam & Dignitatem Regiam, nec a Corona separari possunt, nec a privata persona possideri*.[108] That is to say, those things which belong to Jurisdiction and Peace, and those things that are annexed to Justice, and [40] Peace, appertain to none, but to the Crown and Dignity of the King, nor can be separated from the Crown,

[a] 21

[b] curret

[107] Bracton, *De legibus*, 5v–6.

[108] Another composite: '*Ea vero quae jurisdictionis sunt & pacis, & ea quae sunt justitiae et paci annexa, ad nullum pertinent, nisi ad coronam & dignitatem regiam, nec a corona separari poterunt,* cum faciant ipsam coronam. Est enim corona Regis facere iustitiam & iudicium, & tenere pacem, & sine quibus, coronam consistere non potest, nec tenere. Huiusmodi autem iura sive iurisdictiones ad personas vel tenementa transferri non poterunt, *nec a privata persona possideri*.' (ibid., 55v).

nor be possest by a private Person. Again you'l find in *Fleta* (a Law-Book written in the time of *Edw.* 2.)[109] That Liberties though granted by the King, if they tend to the hinderance of Justice, or subversion of the Regal Power, were not to be used, nor allowed: For in that Book *c.* 20. concerning Articles of the Crown, which the Justices Itinerant are to enquire of, the 54th Article is this, you shall inquire *De Libertatibus concessis quae impediunt Communem Justitiam, & Regiam Potestatem subvertunt.*[110] Now what is a greater hindrance to Common Justice, or a greater subversion of the Regal Power, than a Liberty in Subjects to hinder the King from raising Money necessary to suppress, or prevent Rebellions, which doth destroy Justice, and subvert the power of the Soveraignty? Moreover when a Charter is granted by a King in these words, *Dedita & coram pro me & Haeredibus meis*,[a][111] the grantor by the Common-Law (as Sir *Edw. Coke* sayes in his Commentaries on *Littleton*) is to warrant his Gift;[112] and I think it Reason, especially if the Gift be upon Consideration of a price Paid. Suppose a Forraign State should lay[b] claim to this Kingdom ('tis no Matter as to the Que-[41]stion I am putting, whether the Claim be unjust) how would you have the King to warrant to every Free-holder in *England* the Lands they hold of him by such a Charter? If he cannot levy Money, their Estates are lost, and so is the Kings

[109] The treatise known as 'Fleta' was an account of common law, believed by Coke to date from the reign of Edward II. H's acceptance of this date reveals his knowledge of the work was second-hand or very superficial. Selden's edition of 1647 (the only printed version) not only argued for an earlier date (Selden, *Ad Fletam dissertatio*, 177–85), but stated it upon the title page: *Fleta, seu Commentarius juris Anglicani sic nuncupatus, sub Edwardo Rege Primo . . . ab anonymo conscriptus* [Fleta, or the commentary on English law thus titled, composed by an unknown hand under King Edward I].

[110] 'Concerning liberties granted which impede Common Justice and subvert Royal Power' (*Fleta*, 26).

[a] ∼. The

[111] 'Given to and in the presence of for me and my Heirs.'

[112] The law of warranties was intricate and H may not have troubled to understand its technicalities. To warrant a gift is to promise that you and your heirs will defend the donee's title against 'eviction' (that is, against all other legal claimants), or else will substitute real property of at least equivalent value. One function of a warranty was thus to extinguish the claims of the donor's heirs. Monarchs were never warrantors, but in their natural capacities they could inherit such an obligation. Coke's detailed discussion (*First Inst.*, 365a–93b) does not explicitly state that donors are obliged to warrant their gifts.

[b] say

Estate, and if the Kings Estate be gone, how can he repair the Value due upon the Warranty?[113] I know that the Kings Charters are not so meerly Grants, as that they are not also Laws;[114] but they are such Laws as speak not to all the Kings Subjects in general, but only to his Officers; implicitly forbidding them to Judge, or Execute any thing contrary to the said Grants. There be many Men that are able Judges of what is right Reason, and what not; when any of these shall know that a Man has no Superiour, nor Peer in the Kingdom, he[115] will hardly be perswaded he can be bound by any Law of the Kingdom, or that he who is Subject to none but God, can make a Law upon himself, which he cannot also as easily abrogate, as he made it. The main Argument, and that which so much taketh with the throng of People, proceedeth from a needless fear put into their minds by such Men as mean to make use of their Hands to their own ends; for if (say they) the King may (notwithstanding the Law) do what he please, and nothing do[a] restrain him but the [42] fear of punishment in the World to come, then (in case there come a King that fears no such punishment) he may take away from us, not only our Lands, Goods, and Liberties, but our Lives also if he will: And they say true; but they have no reason to think he will, unless it be for his own profit, which cannot be; for he loves his own Power; and what becomes of his power when his Subjects are destroyed, or weakned, by whose multitude, and strength he enjoyes his power, and every one of his Subjects his Fortune?[116] And lastly, whereas they sometimes say the King is bound, not only to cause his Laws to be observ'd, but also to observe them himself; I think the King causing them to be observ'd is the same thing as observing them himself: For I never heard it taken for good Law, that the King may be Indicted,[117]

[113] The argument implied appears to be: (i) At common law gifts must be warranted (ii) Kings make gifts at common law (iii) Common law must therefore allow the King the resources to meet the obligations a warranty implies.

[114] Contrast *Lev.*, 150: 'Charters are Donations of the Soveraign; and not Lawes, but exemptions from Law.'

[115] i.e. the man who can judge right reason.

[a] to I owe this emendation to Noel Malcolm.

[116] Cf. *El.*, II v 1; *De C.*, x 2; *Lev.*, 182.

[117] Indictment is 'a Bill or Declaration in form of Law, exhibited by way of Accusation against one for some Offence either criminal or penal, and preferred to Jurors, and by their Verdict found and presented to be true before a Judge or Officer.' (*Termes de la ley*, 306).

or Appealed,[118] or served with a Writ, till the long Parliament practised the contrary upon the good King *Charles*, for which divers of them were Executed, and the rest by this our present King pardoned.[119]

La. Pardoned by the King and Parliament.[120]

Ph. By the King in Parliament[121] if you will, but not by the King, and Parliament; you cannot deny, but that the pardoning of Injury,[122] [belongs] to the Person that is Injur'd.[a] Trea-[43]son, and other Offences against the Peace, and against the Right of the Soveraign are Injuries done to the King; and therefore whosoever is pardoned any such Offence, ought to acknowledge he ows his Pardon to the King alone: But as to such Murders, Felonies, and other Injuries as are done to any Subject how mean soever, I think it great reason that the parties endammaged ought to have satisfaction before such pardon be allow'd.[123] And in the death of a Man, where restitution of Life is Impossible, what can any Friend, Heir, or other party that may appeal, require more than reasonable satisfaction some other way? Perhaps he will be content with nothing but Life for Life; but that is Revenge, and belongs to God, and under God to the King, and none else;[124] therefore if there be reasonable satisfaction tendred, the King, without sin (I think) may pardon him. I am sure, if the pardoning him be a sin, that neither King, nor Parliament, nor any earthly Power can do it.

[118] A largely obsolete procedure, in which an accusation of felony or treason was levelled by a private individual.

[119] The King was not in fact so merciful; those who had signed his father's death warrant but were not executed were actually left to die in prison (Hutton, *Charles II*, 172).

[120] By an 'Act of Free and General Pardon Indempnity and Oblivion' (SR V 226–34: 12 Car II c.11).

[121] By a King who happens to act within a parliamentary setting, as opposed to a King who has some need of parliament's consent. Cf. *Lev*., 139.

[122] 'Injury' is a term of art for H, referring, 'in the proper signification', to breach of covenant (*Lev*., 90; cf. *El*., I xvi 2; *De C*., iii 3).

[a] ∼,

[123] Cf. *Lev*., 180.

[124] Some puritans insisted, following *Gen*. ix 6 ('whoso sheddeth man's blood, by man shall his blood be shed') that it was always wrong to pardon murder. H's talk of royal revenge should probably not be taken literally; his previous unambiguous opinion was that 'Revenge without respect to the Example, and profit to come' is against the law of nature (*Lev*., 76; cf. *El*., I xvi 10; *De C*., iii 11).

La. You see by this your own Argument, that the Act of *Oblivion*, without a Parliament could not have passed; because, not only the King, but also most of the Lords, and abundance of Common People had received Injuries; which not being pardonable, but by their own Assent, it was absolutely ne-[44]cessary that it should be done in Parliament, and by the assent of the Lords and Commons.

Ph. I grant it; but I pray you tell me now what is the difference between a general Pardon, and an Act of *Oblivion*?

La. The word Act of *Oblivion* was never in our Books[125] before; but I believe it is in yours.

Ph. In the State of *Athens* long ago, for the Abolishing of the Civil War, there was an Act agreed on; that from that time forward, no Man should be molested for any thing (before that Act done) whatsoever without exception, which Act the makers of it called an Act of *Oblivion*; not that all Injuries should be forgotten (for then we could never have had the story) but that they should not rise up in Judgment against any Man.[126] And in imitation of this Act the like was propounded (though it took no effect) upon the death of *Julius Caesar*, in the Senate of *Rome*.[127] By such an Act you may easily conceive that all Accusations for offences past were absolutely dead, and buried,[a] and yet we have no great reason to think, that the objecting one to another of the Injuries pardoned, was any violation of those Acts, except the same were so expressed in the Act it self.[128] [45]

La. It seems then that the Act of *Oblivion* was here no more, nor of other nature than a General Pardon.[129]

[125] Books of common law.

[126] The obvious authority was Xenophon's continuation of Thucydides, which H had surely read when translating the latter (Xenophon, *Hellenica*, 169). It lists exceptions to the amnesty. H may have been influenced by Sir Walter Raleigh (*History of the World*, III ix 3), who stated that 'a law was passed by which all injuries past should be forgotten'.

[127] Plutarch, *Cicero*, xlii; Cicero, *Philippics*, 21.

[a] ∼.

[128] 12 Car II c.11 §24 made it illegal, for a three-year period, 'malitiously to call or alledge of, or object against any other person or persons any name or names, or other words of reproach any way tending to revive the memory of the late Differences or the occasions thereof' (SR V 230).

[129] This statement is qualified at pp. 133–4 below.

Of Courts.

Ph. Since you acknowledge that in all controversies, the Judicature originally belongeth to the King, and seeing that no Man is able in his own person to execute an Office of so much business; what order is taken for deciding of so many, and so various Controversies?

La. There be divers sorts of Controversies, some of which are concerning Mens Titles to Lands, and Goods; and some Goods are Corporeal, as[a] Lands, Money, Cattel, Corn, and the like, which may be handled, or seen; and some Incorporeal, as Priviledges, Liberties, Dignities, Offices, and many other good things, meer Creatures of the Law, and cannot be handled or seen: And both of these kinds are concerning *Meum*, and *Tuum*. Others there are concerning Crimes punishable divers wayes; and amongst some of these, part of the punishment is some Fine, or Forfeiture to the King, and then it is called a Plea of the Crown, in case the King sue the party, otherwise it is but a private Plea, which they call an Appeal: And though upon Judg-[46]ment in an Appeal the King shall have his Forfeiture; yet it cannot be called a Plea of the Crown, but when the Crown pleadeth for it.[130] There be also other Controversies concerning the Government of the Church, in order to Religion, and virtuous Life. The offences both against the Crown, and against the Laws of the Church are Crimes; but the offences of one Subject against another, if they be not against the Crown, the King pretendeth[131] nothing in those Pleas, but the Reparation of his Subjects injur'd.

Ph. A Crime is an offence of any kind whatsoever, for which a penalty is Ordain'd by the Law of the Land: But you must understand that dammages awarded to the party injur'd, has nothing common with the nature of a penalty, but is meerly a Restitution, or satisfaction due to the party griev'd by the Law of Reason, and consequently is no more a punishment than is the paying of a Debt.[132]

La. It seems by this Definition of a Crime you make no difference between a Crime, and a sin.

[a] and

[130] Cf. *Lev.*, 125.

[131] =claims.

[132] Cf. *Lev.*, 164.

Ph. All Crimes are indeed Sins, but not all Sins Crimes. A Sin may be in the thought or secret purpose of a Man, of which neither a Judge, nor a Witness, nor any Man take notice; but a Crime is such a Sin as consists in an Action against the Law, of [47] which Action he can be Accused, and Tryed by a Judge, and be Convinced,[133] or Cleared by Witnesses. Farther; that which is no Sin in it self, but indifferent, may be made Sin by a positive Law. As when the Statute was in force; that no Man should wear Silk in his Hat, after the Statute, such wearing of Silk was a Sin, which was not so before:[134] Nay sometimes an Action that's good in it self, by the Statute Law may be made a Sin; as if a Statute should be made to forbid the giving of Alms to a strong and sturdy Beggar;[135] such Alms after that Law would be a Sin, but not before: For then it was Charity, the Object whereof is not the strength, or other Quality of the poor Man, but his Poverty. Again, he that should have said in Queen *Maries* time, that the *Pope* had no Authority in *England*, should have been Burnt at a Stake; but for saying the same in the time of Queen *Elizabeth*, should have been Commended. You see by this, that many things are made Crimes, and no Crimes, which are not so in their own Nature, but by Diversity of Law, made upon Diversity of Opinion, or of Interest[136] by them which have Authority: And yet those things, whether good, or evil, will pass so with the Vulgar (if they hear them often with odious terms recited) for hainous Crimes in themselves, as many [48] of those Opinions, which are in themselves Pious, and Lawful, were heretofore by the Popes Interest therein[137] called Detestable Heresie. Again; some Controversies are of things done upon the Sea, others of things done upon the Land. There need be many Courts to the deciding of so many kinds of Controversies. What order is there taken for their Distribution?

[133] =convicted.

[134] 1&2 Philip & Mary c.2 §1 (SR IV 239).

[135] St German discusses 23 Edward III c.7 (SR I 308), a law to this effect (St German, *Dr and Student*, 41, 99–101).

[136] =personal advantage.

[137] The primary meaning here is probably 'because the Pope's interests were affected by them'; but the phrasing also connotes both 'by the Pope's machinations' and 'by the Pope's followers'.

La. There be an extraordinary great number of Courts in *England*; First; there be the Kings Courts both for Law, and Equity in matters Temporal, which are the Chancery, the Kings-Bench, the Court of Common-Pleas, and for the Kings Revenue the Court of the Exchequer, and there be Subjects Courts by Priviledge, as the Courts in *London*, and other priviledg'd places. And there be other Courts of Subjects, as the Court of Landlords, called the Court of Barons,[138] and the Courts of Sherifs. Also the Spiritual Courts are the Kings Courts at this day, though heretofore they were the *Popes* Courts. And in the Kings Courts, some have their Judicature by Office, and some by Commission, and some Authority to Hear, and Determine, and some only to Inquire, and to Certifie into other Courts. Now for the Distribution of what Pleas every Court may hold; it is commonly held, that all the Pleas of the Crown, and of all [49] Offences contrary to the Peace are to be holden in the Kings Bench, or by Commissioners, for *Bracton* saith; *Sciendum est, quod si Actiones sunt Criminales, in Curia Domini Regis debent determinari; cum sit ibi poena Corporalis*[a] *infligenda, & hoc coram ipso Rege, si tangat personam suam, sicut Crimen Laesae Majestatis, vel coram Justitiariis ad hoc specialiter assignatis [si tangat personas privatas]*.[b] That is to say; That if the Plea be Criminal, it ought to be determin'd in the Court of our Lord the King, because there they have power to inflict Corporeal punishment, and if the Crime be against his person, as the Crime of Treason, it ought to be determin'd before the King himself, or if it be against a

[138] Although it was perfectly proper to call such a court a *curia baronis* (cf. *First Inst*., 58a), the conventional English expression was 'Court Baron'; H may have intended the English phrase to be a little jarring.

[a] *C rporalis*. The missing character is faintly visible in some copies.

[b] The words supplied ('if it should touch private persons') are translated by H just below. Bracton's text reads: 'Et sciendum, quod si actiones criminales sint, in curia domini Regis debent terminari, cum sit ibi poena corporalis infligenda, & hoc coram ipso Rege, si tangat personam suam, sicut crimen laesae maiestatis, vel coram justitiariis ad hoc specialiter assignatis, si tangat personas privatas' (Bracton, *De legibus*, 104v). The four last words reveal that his distinction was between crimes affecting the King's person (which he would hear himself) and crimes affecting private individuals (which would be dealt with by commissioners). It is possible that H chose to omit these words. But he evidently thought that he had shown, in the words of the sentence following the translation, that 'Kings did . . . determine Pleas of Treason . . . by their own Persons'. It follows that he must have meant this passage to give a fuller account of what Bracton said.

private person, it ought to be determin'd by Justices Assigned; that is to say, before Commissioners. It seems by this, that heretofore Kings did hear and determine Pleas of Treason against themselves, by their own Persons; but it has been otherwise a long time, and is now: For it is now the Office of the Lord Steward of *England* in the Tryal of a Peer, to hold that Plea by a Commission especially for the same. In Causes concerning *Meum*, and *Tuum*, the King may sue, either in the Kings-Bench, or in the Court of Common Pleas, as it appears by *Fitzherbert* in his *Natura Brevium*, at the Writ of Escheat.[139] [50]

Ph. A King perhaps will not sit to determine of Causes of Treason against his Person, lest he should seem to make himself Judge in his own Cause; but that it shall be Judged by Judges of his own making, can never be avoided, which is also one as if he were Judge himself.

La. To the Kings-Bench also (I think) belongeth the Hearing, and Determining of all manner of Breaches of the Peace whatsoever, saving alwayes to the King that he may do the same, when he pleaseth, by Commissioners. In the time of *Henry* the 3d, and *Edward* the 1st, (when *Bracton* wrote) the King did usually send down every seven years into the Country Commissioners called Justices Itinerant,[140] to Hear, and Determine generally all Causes Temporal, both Criminal, and Civil, whose places have been now a long time supplyed by the Justices of Assize, with Commissions of the Peace of *Oyer*, and *Terminer*, and of Gaol-Delivery[a].[141]

Ph. But why may the King only Sue in the Kings-Bench, or Court of Common-Pleas, which he will, and no other Person may do the same?

La. There is no Statute to the contrary, but it seemeth to be the Common-Law; for Sir *Edw. Coke*, 4 *Inst*. setteth down the Jurisdiction of the Kings-Bench; which (he says) has; [142]First, Jurisdiction in all [51] Pleas of the Crown. Secondly, The Correcting of all manner of Errors of other Justices, and

[139] Fitzherbert, *Novel Natura Brevium*, 144a.

[140] *Fourth Inst*., 184–5.

[a] Goal-Delivery.

[141] Commissions of Gaol-delivery gave power to empty the gaols and try the malefactors that were found there; Commissions of Oyer and Terminer gave power to try other offences. Justices of assize invariably came equipped with both.

[142] P/phrase to 'personal Actions' (*Fourth Inst*., 71).

Judges, both of Judgments and Process (except of the Court of Exchequer) which he sayes, is to this Court *Proprium quarto modo*.[143] Thirdly; That it has power to Correct all Misdemeanours *extrajudicial* tending to the breach of the Peace, or oppression of the Subjects, or raising of Factions, Controversies, Debates, or any other manner of Misgovernment. Fourthly; It may hold Plea by Writ out of the Chancery of all Trespasses done *Vi & Armis*.[144] Fifthly; It hath power to hold Plea by Bill for Debt, Detinu, Covenant, Promise, and all other personal Actions; but of the Jurisdiction of the Kings-Bench in Actions real[145] he says nothing; save, that [146]if a Writ in a Real Action be abated by Judgment in the Court of Common-Pleas, and that the Judgment be by a Writ of Error, reversed in the Kings-Bench, then the Kings-Bench may proceed upon the Writ.

Ph. But how is the Practice?

La. Real Actions are commonly decided, as well in the Kings-Bench, as in the Court of Common-Pleas.

Ph. When the King[a] by Authority in Writing maketh a Lord-Chief-Justice of the Kings-Bench; does he not set down what he makes him for? [52]

La. Sir *Edw Coke* sets down the Letters Patents, whereby of Antient time the Lord Chief-Justice was Constituted, wherein is expressed to what end he hath his Office; *viz*. [147]*Pro Conservatione nostra, & tranquilitatis Regni nostri, & ad Justitiam universis & singulis de Regno nostro exhibendam, Constituimus Dilectum & Fidelem nostrum* P.B. *Justitiarium Angliae, quamdiu nobis placuerit Capitalem, &c*. That is to say, for the preservation of our self, and of the Peace of our Realm, and for the doing of Justice to all

[143] It is not very clear from Coke's text (and was probably not obvious to H) if the Latin phrase ('proper in a fourth way') is meant as a term of art. In fact, the meaning is non-technical; Coke was drawing the fourth (of no fewer than six) conclusions from a passage by Bracton containing the phrase '*proprias causas regias*' ('the King's own suits').

[144] 'By force and arms': a phrase (often wholly fictitious) that had to be inserted in all complaints of 'trespass'.

[145] An action real is an action to recover some specific thing; an action personal seeks recompense from a person.

[146] P/phrase to end of speech (*Second Inst*., 23).

[a] Kng

[147] *Fourth Inst*., 74. 'Letters patent' is a slip (repeated below); as the passage cited explains, the Lord Chief Justice had been made by writ since the time of Edward I.

and singular our Subjects, we have Constituted our Beloved and Faithful *P.B.* during our pleasure, Chief Justice of *England*, &c.*

Ph. Methinks 'tis very plain by these Letters Patents, that all Causes Temporal within the Kingdom (except the Pleas that belong to the Exchequer)[148] should be decidable by this Lord-Chief-Justice. For as for Causes Criminal, and that concern the Peace, it is granted him in these words, for the Conservation of our self, and peace of the Kingdom, wherein are contained all Pleas Criminal; and, in the doing of Justice to all and singular the Kings Subjects are comprehended all Pleas Civil. And as to the Court of Common-Pleas, it is manifest it may hold all manner of Civil-Pleas (except those of the Exchequer) by *Magna Charta, Cap.*11.[149] [53] So that all original Writs concerning Civil-Pleas are returnable into either of the said Courts; but how is the Lord-Chief-Justice made now?

La. By these words in their Letters Patents; [150]*Constituimus vos Justitiarium nostrum Capitalem ad Placita coram nobis tenenda, durante beneplacito nostro*. That is to say, we have made you our Chief-Justice to hold Pleas before our self, during our pleasure. But this Writ, though it be shorter, does not at all abridge the power they had by the former. And for the Letters Patents for the Chief-Justice of the Common-Pleas, they go thus, [151]*Constituimus dilectum & Fidelem, &c. Capitalem Justitiarium de Communi Banco, Habendum, &c. quamdiu nobis placuerit, cum vadiis & foedis ab antiquo debitis & consuetis. Id est*, We have Constituted our Beloved and Faithful, *&c.* Chief-Justice of the Common-Bench, To have, *&c.* during our pleasure, with the ways, and Fees thereunto heretofore due, and usual.

Ph. I find in History, that there have been in *England* always a Chancellour and a Chief-Justice of *England*, but of a Court of Common-Pleas there is no mention before *Magna Charta*. Common-Pleas there were ever both here, and I think, in all Nations; for Common-Pleas and Civil-Pleas I take to be the same. [54]

La. [152]Before the Statute of *Magna Charta* Common-Pleas (as Sir *Edw. Coke* granteth, 2 *Inst.* p. 21.) might have been holden in the

[148] Ibid., 72.
[149] *Second Inst.*, 550–1.
[150] Quot. to *nostro* (*Fourth Inst.*, 75).
[151] Quot. to '*consuetis*' (ibid., 100).
[152] P/phrase to end of speech (*Second Inst.*, 21–2).

Kings-Bench; and that Court being removeable at the Kings will, the Returns of Writs were *Coram Nobis ubicunque fuerimus in Anglia*;[153] whereby great trouble of Jurors ensued, and great charges of the parties, and delay of Justice; and that for these causes it was Ordain'd, that the Common-Pleas should not follow the King, but be held in a place certain.

Ph. Here Sir *Edw. Coke* declares his Opinion, that no Common-Plea can be holden in the Kings-Bench, in that he says they might have been holden then. And yet this doth not amount to any probable proof, that there was any Court of Common-Pleas in *England* before *Magna Charta*: For this Statute being to ease the Jurors, and lessen the Charges of Parties, and for the Expedition of Justice had been in Vain, if there had been a Court of Common-Pleas then standing; for such a Court was not necessarily to follow the King, as was the Chancery, and the Kings-Bench. Besides, unless the Kings-Bench, wheresoever it was, held Plea of civil Causes, the Subject had not at all been eased by this Statute: For supposing the King at *York*, had not the Kings Subjects about *London*, Jurors, and parties as much [55] trouble, and charge to go to *York*, as the People about *York* had before to go to *London*? Therefore I can by no means believe otherwise, then that the Erection of the Court of Common-Pleas was the effect of that Statute of *Magna Charta, Cap*. 11. And before that time not existent, though I think that for the multiplicity of Suits in a great Kingdom there was need of it.

La. Perhaps there was not so much need of it as you think: For in those times the Laws, for the most part, were in setling, rather than setled; and the old Saxon Laws concerning Inheritances were then practised, by which Laws speedy Justice was Executed by the Kings Writs, in the Courts of Barons, which were Landlords to the rest of the Freeholders, and Suits of Barons in County-Courts, and but few Suits in the Kings Courts, but when Justice could not be had in those Inferior Courts; but at this day there be more Suits in the Kings Courts, than any one Court can dispatch.

Ph. Why should there be more Suits now, than formerly? For I believe this Kingdom was as well Peopled then as now.

[153] 'Before Us wherever We are in England.'

La. Sir *Edw. Coke*, 4 *Inst*. p. 76. assigneth for it six Causes, 1. Peace, 2. Plenty, 3. The Dissolution of Religious Houses, and dispersing of their Lands among so many several persons, 4. The multitude of Infor-[56]mers, 5. The number of Concealers, [154] 6. The multitude of Attorneys.

Ph. I see Sir *Edw. Coke* has no mind to lay any fault upon the Men of his own Profession; and that he Assigns for Causes of the Mischiefs, such things as would be Mischief, and Wickedness to amend; for if Peace, and Plenty, be the cause of this Evil, it cannot be removed but by War and Beggery; and the Quarrels arising about the Lands of Religious Persons cannot arise from the Lands, but from the doubtfulness of the Laws. And for Informers they were Authorised by Statutes, to the Execution of which Statutes they are so necessary, as that their number cannot be too great, and if it be too great the fault is in the Law it self. The number of Concealers, are indeed a number of Cousteners,[155] which the Law may easily Correct. And lastly for the multitude of Attorneys, it is the fault of them that have the power to admit, or refuse them.[156] For my part I believe that Men at this day have better learn't the Art of Caviling against the words of a Statute, than heretofore they had, and thereby encourage themselves, and others, to undertake Suits upon little reason. Also the variety and repugnancy[157] of Judgments of Common-Law do oftentimes put Men to hope for Victory in causes, whereof in reason they had no [57] ground at all. Also the ignorance of what is Equity in their own causes, which Equity not one Man in a thousand ever Studied, and the Lawyers themselves seek not for their Judgments in their own Breasts, but in the precedents of former Judges,[158] as the Antient Judges sought the same, not in their own Reason, but in the Laws of the Empire. Another, and perhaps the greatest cause of multitude of Suits is this, that for want of Registring of conveyances of Land, which might easily be done in the Townships where the Lands ly, a Purchase cannot easily be had, which

[154] 'Concealers are such as find out lands concealed, that is, such lands as are secretly detained from the King by common persons' (*Termes de la ley*, 158).

[155] =cheats.

[156] The judges of particular courts in which they operated.

[157] =contradictory nature.

[158] Cf. *El*., I xvii 11, II x 10; *De C*., xiv 15; *Lev*., 144; *Beh*., 6 (EW VI 169).

will not be litigious.[159] Lastly, I believe the Covetousness of Lawyers was not so great in Antient time, which was full of trouble, as they have been since in time of Peace, wherein Men have leisure to study fraud, and get employment from such Men as can encourage to Contention. And how ample a Field they have to exercise this Mystery in is manifest from this, that they have a power to Scan and Construe every word in a Statute, Charter, Feofment, Lease, or other Deed, Evidence, or Testimony. But to return to the Jurisdiction of this Court of the Kings-Bench, where, as you say, it hath power to correct and amend the Errors of all other Judges, both in Process, and in Judgments; cannot the Judges of the Com-[58]mon-Pleas correct Error in Process in their own Courts, without a Writ of Error from another Court?

La. Yes; and there be many Statutes which Command them so to do.[160]

Ph. When a Writ of Error is brought out of the Kings-Bench, be it either Error in Process, or in Law, at whose Charge is it to be done?

La. At the Charge of the Clyent.

Ph. I see no reason for that; for the Clyent is not in fault, who never begins a Suit but by the advice of his Council Learned in the Law, whom he pays for his Council given. Is not this the fault of his Councellor? Nor when a Judge in the Common-Pleas hath given an Erroneous Sentence, [is it][a] always likely that the Judge of the Kings-Bench will reverse the Judgment (though there be no Question, but as you may find in *Bracton*, and other Learned Men, he has power to do it) because being Professors of the same Common Law, they are perswaded, for the most part, to give the same Judgments: For example; if Sir *Edw. Coke* in the last Terme that he sate Lord-Chief-Justice in the Court of Common-Pleas, had given an Erroneous Judgment, that when he was removed, and made Lord-Chief-Justice of the Kings-Bench,[161]

[159] A register of property in land was a standard demand of moderate law reformers during the Interregnum (Veall, *Movement for law reform*, 219–24); it was also recommended to the exiled Charles II by H's patron the Earl of Newcastle (Slaughter, *Ideology and politics*, 32).

[160] It is not clear what statutes H is referring to.

[a] it is

[161] Coke was moved from Common Pleas to King's Bench during the Michaelmas term of 1613.

[he] would therefore have reversed the said Judgment, it is possi-[59]ble[a] he might, but not very likely. And therefore I do believe there is some other power, by the King constituted, to reverse Erroneous Judgments, both in the Kings-Bench, and in the Court of Common-Pleas.

La. I think not; for there is a Statute to the contrary, made 4°, *Hen*. 4. *cap*. 23. in these words; Whereas, as well in Plea Real[b], as in Plea Personal, after Judgment in the Court of our Lord the King, the Parties be made to come upon grievous pain, sometimes before the King himself, sometimes before the Kings Council, and sometimes to the Parliament to answer thereof anew, to the great Impoverishing of the Parties aforesaid, and to the subversion of the Common-Law of the Land, it is ordained and established, that after Judgment given in the Court of our Lord the King, the Parties, and their Heirs shall be there in Peace, until the Judgment be undone by Attaint,[162] or by Error, if there be Error, as hath been used by the Laws in the times of the Kings Progenitors.[163]

Ph. This Statute is so far from being repugnant[164] to that, I say, as it seemeth to me to have been made expressly to confirm the same: For the substance of the Statute is, that there shall be no Suit made by either of the Parties for any thing adjudged, either in the Kings-Bench, or Court of Common-[60]Pleas, before the Judgment be undone by Error, or Corruption prov'd; and that this was the Common-Law before the making of this Statute, which could not be, except there were (before this Statute) some Courts authorised to examine, and correct such Errors as by the Plaintiff should be assign'd. The inconvenience which by this Statute was to be remedied was this, that often [when] Judgment [was] given in the Kings Courts, by which are meant in this place the Kings-Bench, and Court of Common-Pleas, the Party against whom the Judgment was given, did begin a new Suit, and cause his Adversary to come before the King himself; here by the King himself must be understood the King in Person; for though in a Writ by the words

[a] Catchword is 'ble', but **[59]** starts 'he might'.

[b] Re/al (line break: no hyphen).

[162] See below, p.52 n172

[163] 4 Henry IV c.23 (SR II 142).

[164] =contradictory.

Coram nobis[165] is understood the Kings-Bench, yet in a Statute it is never so; nor is it strange, seeing in those days the King did usually sit in Court with his Council, to hear (as sometimes King *James*)[166] and sometimes the same Parties commenced their Suit before the Privy-Council, though the King were absent; and sometimes before the Parliament the former Judgment yet standing. For remedy whereof, it was ordained by this Statute, that no Man should renew his Suit, till the former Judgment was undone by Attaint, or Error; which Reversing of a Judgment had been impossi-[61]ble, if there had been no Court (besides the aforesaid two Courts) wherein the Errors might be Assigned, Examin'd, and Judg'd; for no Court can be esteemed in Law, or Reason, a Competent Judge of its own Errors. There was therefore before this Statute some other Court existent for the hearing of Errors, and reversing of Erroneous Judgments. What Court this was I enquire not yet, but I am sure it could not be either the Parliament or the Privy-Council, or the Court wherein the Erroneous Judgment was given.

La. The Doctor and Student discourses of this Statute, *cap*. 18. much otherwise than you do: For the Author of that Book saith, that against an Erroneous Judgment all Remedy is by this Statute taken away.[167] And though neither Reason, nor the Office of a King, nor any Law positive can prohibit the remedying of any Injury, much less of an unjust Sentence, yet he shows many Statutes, wherein a Mans Conscience ought [not] to prevail above the Law.

Ph. Upon what ground can he pretend, that all Remedy in this case is by this Statute prohibited?

La. He says it is thereby enacted, [168]that Judgment given by the Kings Courts shall not be examin'd in the Chancery, Parliament, nor elsewhere. [62]

[165] In our presence (cf. *Fourth Inst*., 76).

[166] James used to sit in justice in his capacity as King of Scotland, but always refrained from doing so in England. H is probably thinking of 20 June 1616, when James had visited the court of Star Chamber and made a speech upholding Chancery against Coke's criticisms (James VI and I, *Political Writings*, 204–28).

[167] St German, *Dr and Student*, 107–9. The reference shows H read the English version.

[168] Quot. to end of speech (St German, *Dr and Student*, 107).

Ph. Is there any mention of Chancery in this Act? It cannot be examin'd before the King and his Council, nor before the Parliament, but you see that before the Statute it was examin'd somewhere, and that this Statute will have it examin'd there again.

And seeing the Chancery was altogether the highest Office of Judicature in the Kingdom for matter of Equity, and that the Chancery is not here forbidden to examine the Judgments of all other Courts, at least it is not taken from it by this Statute. But what Cases are there in this Chapter of the Doctor and Student, by which it can be made probable, that when Law, and Conscience, or Law, and Equity seem to oppugne one another, the written Law should be preferr'd?

La. [169]If the Defendant wage his Law[170] in an Action of Debt brought upon a true Debt, the Plaintiff hath no means to come to his Debt by way of Compulsion, neither by *Subpoena*, nor otherwise, and yet the Defendant is bound in Conscience to pay him.

Ph. Here is no preferring that, I see, of the Law above Conscience, or Equity; for the Plaintiff in this case loseth not his Debt for want either of Law, or Equity, but for want of Proof; for neither Law, nor Equity can give a Man his Right, unless he prove it. [63]

La. [171]Also if the Grand-Jury in Attaint affirm a false Verdict given by the Petty-Jury,[172] there is no farther Remedy, but the Conscience of the party.

Ph. Here again the want of Proof is the want of Remedy; for if he can prove that the Verdict given was false, the King can give him remedy such way as himself shall think best, and ought to do it, in case the Party shall find surety, if the same Verdict be again affirmed, to satisfie his Adversary for the Dammage, and Vexation he puts him to.

La. But there is a Statute made since; *viz*. 27 *Eliz*. *c*. 8. by which that Statute of [4] *Hen*. 4. 23. is in part taken away; for by that Statute

[169] Quot. to end of speech (ibid., 109), omitting only some redundant phrasing.

[170] A defendant who 'waged his law' found 11 'compurgators' or 'oath-helpers' to swear their faith in his veracity. In theory, these would be neighbours; in practice, they could be hired in Westminster Hall.

[171] Quot. to end of speech (St German, *Dr and Student*, 109), omitting only some redundant phrasing.

[172] Attaint was a procedure by which a 'grand jury' of 24 inquired into the verdict of a previous jury (the petty jury).

Erroneous Judgments given in the Kings-Bench, are by a Writ of Error to be examin'd in the Exchequer-Chamber, before the Justices of the Common-Bench, and the Barons of the Exchequer,[173] and by the preamble of this Act it appears, that Erroneous Judgments are only to be reform'd by the High Court of Parliament.[174]

Ph. But here is no mention, that the Judgments given in the Court of Common-Pleas should be brought in to be examin'd in the Exchequer-Chamber, why therefore may not the Court of Chancery examine a Judgment given in the Court of Common-Pleas? [64]

La. You deny not but, by the Antient Law of *England*, the Kings-Bench may examine the Judgment given in the Court of Common-Pleas.

Ph. 'Tis true; but why may not also the Court of Chancery do the same, especially if the fault of the Judgment be against Equity, and not against the Letter of the Law?

La. There is no necessity of that; for the same Court may examine both the Letter and the Equity of the Statute.

Ph. You see by this, that the Jurisdiction of Courts cannot easily be distinguished, but by the King himself in his Parliament. The Lawyers themselves cannot do it; for you see what Contention there is between Courts, as well as between particular Men. And whereas you say, that Law of 4 *Hen*. 4. 23. is by that of 27 *Eliz. cap*. 8. taken away, I do not find it so. I find indeed a Diversity of opinion between the makers of the former and the latter Statute, in the preamble of the latter and Conclusion of the former. The Preamble of the latter is; [175]forasmuch as Erroneous Judgments given in the Court called the Kings-Bench, are only to be reformed in the High Court of Parliament, and the Conclusion of the former is, that the contrary was Law in the times of the Kings Progenitors.[176] These are no parts of those Laws,

[173] The title of the judges of the Exchequer.

[174] 27 Eliz. c.8 §1 (SR IV 714).

[175] Quot. to 'Parliament' (ibid.).

[176] The chapter concludes: 'That after Judgment given in the Courts of our Lord the King, the Parties and their Heirs shall be thereof in Peace, until the Judgment be undone by Attaint or by Error . . . as hath been used by the Laws in the Times of the King's Progenitors' (SR II 142). Pulton, *Statutes at large* distinguishes typographically between an act's preamble and the rest. The notion of a 'conclusion' of a statute, mirroring the preamble, appears, however, to be unique to H.

but Opinions only con-[65]cerning the Antient Custom in that Case, arising from the different Opinions of the Lawyers in those different times, neither Commanding, nor Forbidding any thing; though of the Statutes themselves, the one forbids that such Pleas be brought before the Parliament, the other forbids it not: But yet if after the Act of *Hen.* 4. such a Plea had been brought before the Parliament, the Parliament might have Heard, and Determin'd it: For the Statute forbids not that! nor can any Law have the force to hinder the Parliament[a] of any Jurisdiction whatsoever they please to take upon them, seeing it is a Court of the King and of all the People together, both Lords, and Commons.

La. Though it be, yet seeing the King (as Sir *Edw. Coke* affirms, 4 *Inst.* p. 71.) [177]hath committed all his power Judicial, some to one Court, and some to another, so as if any Man would render himself to the Judgment of the King, in such case where the King hath committed all his power Judicial to others, such a render should be to no effect. And p. 73. he saith farther; [178]That in this Court the Kings of this Realm have sitten on the High Bench, and the Judges of that Court on the Lower Bench, at his feet; but Judicature belongeth only to the Judges of that Court, and in his presence they answer all Motions. [66]

Ph. I cannot believe that Sir *Edw. Coke*, how much soever he desir'd to advance the authority of himself, and other Justices of the Common-Law, could mean that the King in the Kings-Bench sate as a Spectator only, and might not have answered all motions, which his Judges answer'd, if he had seen cause for it: For he knew that the King was Supream Judge then in all Causes Temporal, and is now in all Causes both Temporal, and Ecclesiastical; and that there is an exceeding great penalty ordained by the Laws for them that shall deny it.[179] But Sir *Edw. Coke* as he had (you see) in many places before, hath put a Fallacy upon himself, by not distinguishing between Committing, and Transferring. He that Transferreth his power, hath deprived himself

[a] Law

[177] Quot. to 'no effect' (*Fourth Inst.*, 71), except that Coke speaks of 'some in one Court, some in another'.

[178] Quot. to end of speech (ibid., 73).

[179] Someone who twice refused to swear an oath to this effect was technically guilty of high treason (5 Eliz c.1 §9: SR IV 404).

of it, but he that Committeth it to another to be Exercised in his name, and under him, is still in the Possession of the same power. And therefore if a Man render himself; that is to say, Appealeth to the King from any Judge whatsoever, the King may receive his Appeal; and it shall be effectual.

La. Besides these 2 Courts, the Kings-Bench for Pleas of the Crown, and the Court of Common-Pleas for Causes Civil, according to the Common-Law of *England*, there is another Court of Justice, that hath Jurisdiction in Causes both Civil, and Cri-[67]minal, and is as Antient a Court, at least as the Court of Common Pleas, and this is the Court of the Lord Admiral, but the proceedings therein are according to the Laws of the *Roman* Empire, and the Causes to be determin'd there are such as arise upon the Marine Sea: For so it is ordain'd by divers Statutes, and confirm'd by many Precedents.

Ph. As for the Statutes they are always Law, and Reason also; for they are made by the Assent of all the Kingdom, but Precedents are Judgments one contrary to another; I mean divers Men, in divers Ages, upon the same case give divers Judgments. Therefore I will ask your Opinion once more concerning any Judgments besides those of the King, as to their validity in Law. But what is the difference between the proceedings of the Court of Admiralty, and the Court of Common-Law?

La. One is, that the Court of Admiralty proceedeth by two Witnesses, without any either Grand-Jury, to Indict, or Petty to Convict, and the Judge giveth Sentence according to the Laws Imperial, which of old time were in force in all this part of Europe,[180] and now are Laws, not by the Will of any other Emperor or Forraign Power, but by the Will of the Kings of *England* that have given them force in their own Domi-[68]nions; the reason whereof seems to be, that the causes that arise at Sea are very often between us, and People of other Nations, such as are Governed for the most part by the self same Laws Imperial.

Ph. How can it precisely enough be determin'd at Sea, especially near the Mouth of a very great River, whether it be upon the Sea, or

[180] A controversial statement. In a celebrated passage that Coke quoted (*Third reports*, xxi), Sir John Fortescue maintained that even the Romans had governed England by the common law (Fortescue, *De laudibus*, 39).

within the Land? For the Rivers also are, as well as their Banks, within, or a part of one Country or other.

La. Truly the Question is difficult, and there have been many Suits about it, wherein the Question has been, whose Jurisdiction it is in.[181]

Ph. Nor do I see how it can be decided, but by the King himself, in case it be not declar'd in the Lord Admirals Letters Patents.

La. But though there be in the Letters Patents a power given to hold Plea in some certain cases; to [uphold][a] any of the Statutes concerning the Admiralty the Justices of the Common-Law may send a Prohibition[182] to that Court, to Proceed in the Plea, though it be with a *non-obstante*[183] of any Statute.[184]

Ph. Methinks that That should be against the Right of the Crown, which cannot be taken from it by any Subject: For that Argument of Sir *Edw. Coke*'s, that the King has given away all his Judicial Power,[185] is worth [69] nothing; because (as I have said before) he cannot give away the Essential Rights of his Crown, and because by a *non-obstante* he declares he is not deceived in his Grant.

La. But you may see by the Precedents alledged by Sir *Edw. Coke*, the contrary has been perpetually practised.[186]

Ph. I see not that perpetually; for who can tell, but there may have been given other Judgments in such cases, which have either been not preserv'd in the Records, or else by Sir *Edw. Coke* (because they were against his opinion) not alledged: For this is possible, though you will not grant it to be very likely; therefore I insist only upon this, that no Record of a Judgment is a Law, save only to the party Pleading, until he can by Law reverse the former Judgment.[187] And as to the proceeding without Juries by

[181] *Fourth Inst*., 135, 137.

[a] Insertion captures Coke's sense.

[182] A writ used to restrain a court from acting in a manner allegedly beyond its jurisdiction.

[183] 'Notwithstanding' (a phrase used in letters patents to dispense with any statutes to the contrary).

[184] *Fourth Inst*., 135, 137. The question was still a live one in the reign of Charles II. For a survey, see the introduction to *Hale on Admiralty jurisdiction*; for a statement printed in 1663, Richard Zouch, *Jurisdiction of Admiralty*, esp. 80–107.

[185] *Second Inst*., 103; *Fourth Inst*., 71.

[186] *Fourth Inst*., 137–42.

[187] Cf. *El*., II x 10; *De C*., xiv 15; *Lev*., 143–4.

two sufficient Witnesses, I do not see what harm can proceed from it to the Common-wealth, nor consequently any just Quarrel that the Justice of the Common-Law can have against their proceedings in the Admiralty: For the Proof of a Fact in both Courts lyeth meerly on the Witnesses, and the difference is no more, but that in the Imperial-Law, the Judge of the Court Judgeth of the Testimony of the Witnesses, and the Jury doth in a Court of Common-Law. Besides, if a Court of Common-Law should chance to [70] Incroach upon the Jurisdiction of the Admiral, may not he send a Prohibition to the Court of Common-Law to forbid their proceeding? I pray you tell me what Reason there is for the one, more than for the other?

La. I know none but long Custom; for I think it was never done.

Ph. The Highest ordinary Court in *England* is the Court of Chancery, wherein the Lord Chancellour, or otherwise Keeper of the Great Seal is the only Judge. This Court is very Antient, as appears by Sir *Edw. Coke*, 4 *Inst*. p. 78[a]. where he nameth the Chancellors of King *Edgar*, King *Etheldred*, King *Edmund*, and King *Edward* the Confessor. His Office is given to him without Letters Patents by the Kings delivery to him of the Great Seal of *England*;[188] and whosoever hath the keeping of the Great Seal of *England* hath the same, and the whole Jurisdiction that the Lord Chancellour ever had by the Statute of 5 *Eliz. cap*. 18. wherein it is declar'd, that such is, and always has been the Common-Law.[189]

[*La*.][b] And Sir *Edw. Coke* says, he has his name of Chancellour from the highest point of his Jurisdiction; *viz*. a *Cancellando*; that is, from Cancelling the Kings Letters Patents, by drawing strokes through it like a Lattice.[190]

Ph. Very pretty. It is well enough known that *Cancellarius* was a great Officer under [71] the *Roman Empire*, whereof this Island was once a Member, and that the Office came into this Kingdom, either with, or in Imitation of the *Roman* Government. Also it was long after the time of the 12 *Caesars*, that this Officer was

[a] 87

[188] *Fourth Inst*., 87.

[189] SR IV 447; *Fourth Inst*., 87.

[b] Cropsey's suggestion. In copy-text, the sentence following is part of *Ph*.'s previous speech. H starts a speech with 'And' in seven other places in the text.

[190] *Fourth Inst*., 88.

created in the State of *Rome*. For till after *Septimius Severus* his time, the Emperors did diligently enough take cognizance of Causes and Complaints for Judgments given in the Courts of the Praetors, which were in *Rome* the same that the Judges of the Common-Law are here;[191] but by the continual Civil Wars in after-times for the choosing of Emperors, that diligence by little and little ceased; and afterwards (as I have Read in a very good Author of the *Roman* Civil Law)[192] the number of complaints being much increased, and being more than the Emperor could dispatch, he appointed an Officer as his Clerk, to receive all such Petitions; and that this Clerk caused a partition to be made in a Room convenient, in which partition-Wall, at the heighth of a Mans reach, he placed at convenient distances certain Bars; so that when a Suitor came to deliver his Petition to the Clerk, who was sometimes absent, he had no more to do, but to throw in his Petition between those Bars, which in *Latin* are called properly *Cancelli*; not that any certain Form of those Bars, or any Bars at all were ne-[72]cessary; for they might have been thrown over, though the whole space had been left open; but because they were *Cancelli*, the Clerk Attendant, and keeping his Office there, was called *Cancellarius*: And any Court Bar may properly enough be called *Cancelli*, which does not signify a Lattice; for that is but a meer Conjecture grounded upon no History nor Grammar, but taken up at first (as is likely) by some Boy that could find no other word in the Dictionary for a Lattice but *Cancelli*.[193] The Office of this Chancellour was at first but to Breviate the matter of the Petitions, for the easing of the Emperor, but Complaints encreasing daily, they were too many, considering other Businesses more necessary for the Emperor to determine, and this caused the Emperor to commit the Determination of them to the Chancellor again; what Reason doth Sir *Edw. Coke* alledge to prove, that the highest point of the Chancellors Jurisdiction is to Cancel his Masters Letters Patents, after they were Sealed with his Masters Seal; unless he hold Plea concerning the validity of them, or of his Masters meaning in them, or of the surreptitious

[191] That is to say, they exercised a broadly equitable jurisdiction.

[192] Unidentified.

[193] This 'conjecture' was supported by most authorities: Cowell, *Interpreter*, s.v. 'Chanceler'; Calvinus, *Lexicon*, s.v. 'Cancelli'.

getting of them, or of the abusing of them, which are all causes of Equity? Also, seeing the Chancellor hath his Office only by the delivery of the Great Seal,[194] without any Instruction, or Limitati-[73]on of the Process in his Court to be used; it is manifest, that in all Causes whereof he has the hearing, he may proceed by such manner of hearing, and examining of Witnesses (with Jury, or without Jury) as he shall think fittest for the Exactness, Expedition and Equity of the Decrees. And therefore, if he think the Custome of proceeding by Jury, according to the Custome of *England* in Courts of Common-Law, tend more to Equity (which is the scope[195] of all the Judges in the World, or ought to be) he ought to use that method, or if he think better of another proceeding, he may use it, if it be not forbidden by a Statute.

La. As for this Reasoning of yours I think it well enough; but there ought to be had also a reverend respect to Customs not unreasonable; and therefore, I think, Sir *Edw. Coke* says not amiss; that in such Cases, where the Chancellor will proceed by the Rule of the Common-Law, he ought to deliver the Record in the Kings-Bench;[196] and also it is necessary for the Lord Chancellor to take care of not exceeding [his jurisdiction] as it is limited by Statutes.

Ph. What are the Statutes by which his Jurisdiction is limited? I know that by the 27 *Eliz. cap*. 8. He cannot Reverse a Judgment given in the Kings-Bench for Debt, Detinue, &c.[197] Nor before the Statute could [74] he ever by virtue of his Office, Reverse a Judgment in Pleas of the Crown, given by the Kings-Bench that hath the Cognizance of such Pleas, nor need he; for the Judges themselves, when they think there is need to relieve a Man oppress by ill Witnesses, or power of great Men prevailing on the Jury, or by Error of the Jury, though it be in case of Felony, may stay the Execution, and Inform the King, who will in Equity

[194] *Fourth Inst*., 87.

[195] See above, p.13 n.26.

[196] *Fourth Inst*., 80.

[197] 27 Eliz. c.8 §1 (SR IV 714). 'Debt is a Writ that lies where any summ of money is due to a man by reason of Account, Bargain, Contract, Obligation, or other Especialty [=agreement under seal], to be paid at a certain day, which is not paid' (*Termes de la ley*, 253–4). 'Detinue is a Writ that lies against him who, having goods and chattels delivered to him to keep, refuses to re-deliver them' (ibid., 255).

relieve him. As to the regard we ought to have to Custome, we will Consider of it afterward.

La. First in a Parliament holden the 13th of *Rich*. 2. [198]the Commons Petitioned the King, that neither the Chancellor, nor other Councellor[a] do make any order against the Common-Law, nor that any Judgment be given without due Process of Law.

Ph. This is no unreasonable Petition; for the Common-Law is nothing else but Equity: And by this Statute it appears, that the Chancellors, before that Statute, made bolder with the Courts of Common Law, than they did afterward; but it does not appear that Common-Law in this Statute signifies any thing else, but generally the Law Temporal of the Realm, nor was this Statute ever Printed, that such as I might take notice of it;[199] but whether it be a Statute or not, I know not, till you tell me what the [75] Parliament [was][b] Answer'd to this Petition.

La. [200]The Kings Answer was, the Usages[c] heretofore shall stand, so as the Kings Royalty be saved.

Ph. This is flatly against Sir *Edw. Coke*, concerning the Chancery.

La. In another Parliament, 17 *Rich*. 2. It is Enacted, at the Petition of the Commons; That [201]forasmuch as People were Compelled to come before the Kings Council, or in Chancery, by Writs grounded upon untrue Suggestions, that the Chancellor for the time being, presently[202] after such Suggestions, be duly found, and proved untrue, shall have power to Ordain, and Award Dammages, according to his discretion, to him which is so Travelled[203] unduly, as is aforesaid.

Ph. By this Statute it appears, that when a Complaint is made in Chancery upon undue Suggestions, the Chancellor shall have the Examination of the said Suggestions, and as he may avoid Dammages when the Suggestions are untrue, so he may also

[198] Quot. to end of speech (*Fourth Inst*., 82).

[a] Chancellor

[199] This is correct.

[b] Cropsey emends 'Parliament' to 'King', but the catchword on the previous page is 'Par-'.

[200] Quot. to end of speech (*Fourth Inst*., 82).

[c] Wages

[201] Quot. to end of speech (*Fourth Inst*., 82–3).

[202] =immediately.

[203] =harassed.

proceed by Process to the determining of the Cause, whether it be Real, or Personal, so it be not Criminal.

La. Also the Commons Petitioned in a Parliament of 2 *Hen*. 4. not Printed; [204]That no Writs, nor Privy-Seals be sued out of Chancery, Exchequer, or other places to [76] any Man to appear at a day, upon a pain, either before the King and his Council, or in any other place, contrary to the ordinary Course of Common-Law.

Ph. What Answer was given to this Petition by the King?

La. [205]That such Writs should not be granted without necessity.

Ph. Here again you see the King may deny, or Grant any Petitions in Parliament, either as he thinks it necessary, as in this place, or as he thinks it prejudicial, or not prejudicial to his Royalty, as in the Answer of the former Petition, which is a sufficient proof, that no part of his Legislative Power, or any other Essential part of Royalty can be taken from him by a Statute. Now seeing it is granted, that Equity is the same thing with the Law of Reason, and seeing Sir *Edw. Coke*, I *Inst. Sect*. 21. Defines Equity to be a certain Reason comprehended in no Writing, but consisting only in right Reason, which interpreteth and amendeth the Written-Law;[206] I would fain know to what end there should be any other Court of Equity at all, either before the Chancellor or any other Person, besides the Judges of the Civil, or Common-Pleas? Nay I am sure you can alledge none but this, that there was a necessity of a Higher Court of Equity, than the Courts of Common-Law, to [77] remedy the Errors in Judgment given by the Justices of Inferior Courts, and the Errors in Chancery were irrevocable, except by Parliament, or by special Commission appointed thereunto by the King.

La. But Sir *Edw. Coke* says, that seeing [207]matters of Fact by the Common Law are Tryable by a Jury of 12 Men, this Court should not draw the matter *ad aliud Examen; i.e.* to another

[204] Quot. to end of speech (*Fourth Inst*., 83).

[205] Quot. to end of speech (ibid.).

[206] 'Equitas est perfecta quaedam ratio, quae ius scriptum interpretatur & emendat, nulla scriptura comprehensa, sed solum in vera ratione consistens' (*First Inst*., 24b). For context, see above, p. 9 n.15, where Coke translates 'nulla scripta comprehensa' as 'it self being unwritten'. See also p. 68 below.

[207] P/phrase to end of speech (*Fourth Inst*., 84).

kind of Examination, *viz.* by Deposition of Witnesses, which should be but evidence to a Jury.

Ph. Is[a] the Deposition of Witnesses any more or less, then [b] evidence to the Lord-Chancellor? 'Tis not therefore another kind of Examination; nor is a Jury more capable of duly examining Witnesses than a Lord-Chancellor. Besides, seeing all Courts are bound to Judge according to Equity, and that all Judges in a Case of Equity, may sometimes be deceiv'd, what harm is there to any Man, or to the State, if there be a subordination of Judges in Equity, as well as of Judges in Common-Law? Seeing it is provided by an Act of Parliament[208] to avoid Vexation, that *Subpoenas* shall not be granted, [209]till surety be found to satisfie the Party so grieved and vexed for his Dammages and Expences, if so be the matter may not be made good which is contained in the Bill. [78]

La. There is another Statute of 31 *Hen.* 6. *cap.* 2. wherein there is a Proviso cited by Sir *Edw. Coke* in these words; "Provided, that no matter determinable by the Laws of the Realm, shall be by the said Act determined in other Form, then after the course of the same Law in the Kings Courts having the Determination of the same Law."[210]

Ph. This Law was made but for Seven years, and never continued by any other Parliament, and the motive of this Law was the great Riots, Extortions, Oppressions, *&c.* used during the time of the Insurrection of *John Cade*,[211] and the Indictments and Condemnations wrongfully had by this usurped Authority; and thereupon the Parliament Ordained, that for 7 years following no Man should disobey any of the Kings Writs under the Great Seal, or should refuse to appear upon Proclamation before the Kings Council, or in the Chancery, to Answer to Riots, Extortions, *&c.* For the first time he should lose, *&c.* Wherein there is

[a] To

[b] < to >

[208] 15 H VI c.4 §4 (SR II 296–7).

[209] Quot. to end of speech (*Fourth Inst.*, 83).

[210] Ibid., 83–4. There is no obvious reason for the decision to use inverted commas.

[211] An unconvincing argument. It is true that the previous chapter (31 Henry VI c.1: SR II 360) annulls those legal actions performed under duress in the time of Cade's rebellion (June–July 1450). But 31 Henry VI c.2 (SR V 361–2) was clearly aimed at members of the peerage who would not appear when summoned by the royal council or the chancellor.

nothing at all concerning the Jurisdiction of the Chancery, or any other Court, but an extraordinary power given to the Chancery, and to the Kings Privy-Council, to Determine of those Crimes which were not before that time Tryable, but only by the Kings-Bench, or special Commission: For the Act was made expressly for the punish-[79]ment of a great Multitude of Crimes committed by those that had Acted by the said *Cade*'s Authority; to which Act the Proviso was added, which is here mention'd, that the Proceedings[a] in those Courts of Chancery, and of the Kings Council should be such, as should be used in the Courts, to which the said Causes,[b] before this Act was made, do belong. That is to say, such causes as were Criminal, should be after the order of the Kings-Bench, and such Causes as were not Criminal, but only against Equity, should be Tryed after the manner of the Chancery, or in some cases according to the Proceedings in the Exchequer. I wonder why Sir *Edw. Coke* should cite a Statute (as this is) above two hundred years before expir'd, and other two Petitions; as if they were Statutes, when they were not passed by the King; unless he did it on purpose to diminish (as he endeavours to do throughout his Institutes) the Kings Authority, or to insinuate his own opinions among the People for the Law of the Land: For that also he endeavours by Inserting *Latin* Sentences, both in his Text, and in the Margin, as if they were Principles of the Law of Reason, without any Authority of Antient Lawyers, or any certainty of Reason in themselves, to make Men believe they are the very grounds of the Law of *England*. Now [80] as to the Authority you ascribe to Custome, I deny that any Custome of its own Nature, can amount to the Authority of a Law: For if the Custom be unreasonable, you must with all other Lawyers confess that it is no Law, but ought to be abolished; and if the Custom be reasonable, it is not the Custom, but the Equity that makes it Law. For what need is there to make Reason Law by any Custom how long soever when the Law of Reason is Eternal? Besides, you cannot find in any Statute (though *Lex & Consuetudo* be often mentioned as things to be followed by the Judges in their Judgments) that *Consuetudines*, that is to say, Customs, or Usages did imply any Long

[a] Proceeds
[b] Courts

continuance of former time; but that it signified such Use, and Custom of proceeding, as was then immediately in being before the making of such Statute. Nor shall you find in any Statute the word Common-Law, which may not be there well Interpreted for any of the Laws of *England* Temporal; for it is not the singularity of Process used in any Court; that can distinguish it so as to make it a different Law from the Law of the whole Nation.

La. If all Courts were (as you think) Courts of Equity, would it not be incommodious to the Common-wealth? [81]

Ph. I think not; unless perhaps you may say, that seeing the Judges, whether they have many, or few causes to be heard before them, have but the same wages from the King, they may be too much inclin'd to put off the Causes they use to hear (for the easing of themselves) to some other Court; to the delay of Justice, and dammage of the Parties suing.

La. You are very much deceiv'd in that; for on contrary the Contention between the Courts for Jurisdiction, is of who shall have most Causes brought before them.

Ph. I cry you Mercy, I smelt not that.[212]

La. Seeing also all Judges ought to give their Sentence according to Equity; if it should chance that a Written Law should be against the Law of Reason, which is Equity, I cannot Imagine in that Case how any Judgment can be Righteous.

Ph. It cannot be that a Written Law should be against Reason: For nothing is more reasonable than that every Man should obey the Law, which he hath himself assented to; but that is not always the Law which is signified by *Grammatical* Construction of the Letter, but that which the Legislator thereby intended should be in Force;[213] which Intention, I Confess, is a very hard matter many times to pick out of the words of the Statute, and requires

[212] When he wrote *Lev.*, H was aware of this phenomenon (*Lev.*, 166).

[213] '*Grammatical* Construction of the Letter' is probably not the same as 'the literal sense'. According to *Lev.*, 'In written Lawes, men use to make a difference between the Letter, and the Sentence of the Law: And when by the Letter, is meant whatsoever can be gathered from the bare words, 'tis well distinguished. For the significations of almost all words, are either in themselves, or in the metaphoricall use of them, ambiguous . . . But if by the Letter, be meant the literall sense, then the Letter, and the Sentence or intention of the Law, is all one. For the literall sense is that, which the Legislator intended, should by the letter of the Law be signified' (ibid., 145).

great Ability [82] of understanding, and greater Meditations, and Considerations of such Conjuncture of occasions, and Incommodities as needed a new Law for a Remedy;[214] for there is scarce any thing so clearly written, that when the Cause thereof is forgotten, may not be wrested by an ignorant Grammarian, or a Cavilling Logician, to the Injury, Oppression, or perhaps Destruction of an honest Man. And for this Reason, the Judges deserve that Honour and Profit they enjoy; since the Determination of what particular Causes every particular Court should have Cognizance, is a thing not yet sufficiently explained, and is in it self so difficult, as that the Sages of the Law themselves (the Reason Sir *Edw. Coke* will leave to Law it self) are not yet agreed upon it; how is it possible for a Man that is no professed, or no profound Lawyer, to take notice in what Court he may Lawfully begin his Suit, or give Council in it to his Client?

La. I confess that no Man can be bound to take notice of the Jurisdiction of Courts, till all the Courts be agreed upon it amongst themselves; but what Rule to give Judgment by a Judge can have, so as never to contradict the Law written, nor displease his Legislator I understand not.

Ph. I think he may avoid both, if he take care by his Sentence, that he neither [83] punish an Innocent, nor deprive him of his dammages due from one that maliciously sueth him without reasonable Cause, which to the most of Rational Men, and unbiassed is not, in my Opinion, very difficult. And though a Judge should (as all Men may do) Erre in his Judgment, yet there is always such power in the Laws of *England*, as may content the Parties, either in the Chancery, or by Commissioners of their own choosing, Authorized by the King; for every Man is bound to acquiesce in the Sentence of the Judges he chooseth.

La. In what Cases can the true Construction of the Letter be contrary to the meaning of the Lawmaker?

Ph. Very many, whereof Sir *Edw. Coke* nameth 3, Fraud, Accident, and Breach of Confidence;[215] but there be many more; for there

[214] Cf. ibid., 143. Here H's view was quite compatible with common law orthodoxy; Coke himself had maintained that judges should discover 'the mischief and defect for which the common law did not provide' and 'make such construction as shall suppress the mischief . . . according to the true intent of the makers of the Act' (Coke, *Third reports*, 7b: ER LXXVI 638).

[215] *Fourth Inst*., 84.

be a very great many reasonable Exceptions almost to every General Rule, which the makers of the Rule could not foresee; and very many words in every Statute, especially long ones, that are, as to *Grammar*, of Ambiguous signification, and yet to them that know well, to what end the Statute was made, perspicuous enough; and many Connections of doubtful reference, which by a *Grammarian* may be Cavill'd at, though the Intention of the Lawmaker be never so perspicuous. And these are the difficulties [84] which the Judges ought to Master, and can do it in respect of their Ability for which they are chosen, as well as can be hoped for; and yet there are other Men can do the same, or else the Judges places could not be from time to time supplyed. The Bishops commonly are the most able and rational Men, and obliged by their profession to Study Equity, because it is the Law of God, and are therefore capable of being Judges in a Court of Equity. They are the Men that teach the People what is Sin; that is to say, they are the Doctors[216] in Cases of Conscience. What reason then can you shew me, why it is unfit, and hurtful to the Common-wealth,[a] that a Bishop should be a Chancellor, as they were most often before the time of *Hen*. 8. and since that time once in the Raign of King *James*?[217]

La. But Sir *Ed*. says, that soon after that a Chancellor was made, which was no Professor of the Law, he finds in the Rolls of the Parliament [218]a grievous Complaint by the whole Body of the Realm, and a Petition that the most wise and able Men within the Realm might be chosen Chancellors.

Ph. That Petition was Reasonable, but it does not say which are Abler Men, the Judges of the Common Law, or the Bishops. [85]

La. That is not the great Question as to the Ability of a Judge; both of one, and the other there are Able Men in their own way; but

[216] =teachers.

[a] Interlinear hyphen.

[217] H is correct about medieval practice. John Williams, Bishop of Lincoln, was Lord Keeper of the Great Seal (Lord Chancellor in all but name) from 1621–25. H might have remembered a rumour, reported to him in 1629, that the Archbishop of York was about to be appointed to this post (HW, *Correspondence*, 8) His patron and friend, the Earl of Newcastle (1617–84), noted in 1659 that 'one that is no Lawyere May bee a very good Lord keeper', though he thought professionals were preferable (Slaughter, *Ideology and politics*, 25–6).

[218] Quot. to end of speech (*Fourth Inst*., 79).

when a Judge of Equity has need, almost in every Case, to consider as well the Statute-Law, as the Law of Reason, he cannot perform his Office perfectly, unless he be also ready in[219] the Statutes.

Ph. I see no great need he has to be ready in the Statutes; in the hearing of a Cause do the Judges of the Common-Law Inform the Council at the Bar what the Statute is, or the Council the Judges?

La. The Council Inform the Judges.

Ph. Why may they not as well Inform the Chancellor? Unless you will say, that a Bishop understands not as well as a Lawyer what is sense, when he hears it Read in *English*.[220] No; no; both the one, and the other are able enough, but to be able enough is not enough; when, not the difficulty of the Case only, but also the Passion of the Judge is to be Conquer'd. I forgot to tell you of the Statute of the 36 *Edw*. 3. *Cap*. 9. That [221]if any Person think himself grieved contrary to any of the Articles above Written, or others contained in divers Statutes, will come to the Chancery, or any for him, and thereof make his Complaint, he shall presently[222] there have Remedy by force of the said Articles, and Statutes, without elsewhere [86] pursuing to have Remedy. By the words of this Statute it is very apparent, in my opinion, that the Chancery may hold Plea upon the Complaint of the Party grieved, in any Case Tryable at the Common-Law, because the party shall have present Remedy in that Court, by force of this Act, without pursuing for Remedy elsewhere.

La. Yes; but Sir *Edw. Coke* Answers this Objection, 4 *Inst*. p. 82. in this manner. These words, says he, *He shall have Remedy*, signifie no more but that he shall have presently there a remedial Writ grounded upon those Statutes to give him Remedy at the Common-Law.[223]

[219] =familiar with.

[220] Unlike the courts of common law, the equitable side of Chancery conducted all its business in English.

[221] Quot. to 'pursuing to have Remedy' (*Fourth Inst*., 82: SR I 374).

[222] =immediately.

[223] 'This Act giveth the Chancelor no power to proceed in course of equity, but that he shall grant to the party grieved originall writs which are called remediall grounded upon any statute for his relief' (*Fourth Inst*., 82).

Ph. Very like Sir *Edw. Coke* thought as soon as the Party had his Writ, he had his Remedy, though he kept the Writ in his Pocket, without pursuing his Complaint elsewhere; or else he thought, that in the Common-Bench was not elsewhere than in the Chancery.

La. Then there is the Court of—

Ph. Let us stop here; for this which you have said satisfies me, that seek no more than to distinguish between Justice, and Equity; and from it I Conclude, that Justice fulfils the Law, and Equity Interprets the Law; and amends the Judgments given upon the same Law: Wherein I depart not much from the Definition of Equity, cited [87] in Sir *Edw. Coke*, 1 *Inst. Sect*. 21. *viz*. Equity is a certain perfect Reason that Interpreteth, and Amendeth the Law Written;[224] though I Construe it a little otherwise than he would have done; for no one can mend a Law but he that can make it, and therefore I say not it amends the Law, but the Judgments only when they are Erroneous. And now let us Consider of Crimes in particular (the Pleas whereof are commonly called the Pleas of the Crown) and of the punishments belonging to them; and first of the Highest Crime of all which is High Treason. Tell me what is High Treason.

Of Crimes Capital.

La. The first Statute that declareth what is High Treason, is the Statute of the 25 *Edw*. 3. in these words. *Whereas divers Opinions have been before this time, in what Case Treason shall be said, and in what not; the King, at the Request of the Lords, and of the Commons, hath made Declaration in the manner as hereafter follows; That is to say, when a Man doth Compass, or Imagine the Death of our Lord the King,*[225] *of our Lady the Queen, or of their Eldest Son and Heir; or if a Man doth violate the Kings Companion, or the Kings Eldest Daughter unmarried, or the Wife of the Kings Eldest Son and Heir;* [88] *or if a Man do Levy War against our Lord the King in his*

[224] 'Equitas est perfecta quaedam ratio quae ius scriptum interpretatur & emendat' (*First Inst*., 24b). See above, pp. 9, 61.

[225] A sign that H is quoting from Coke's version. *Statutes at large*, 96 repeatedly prints 'our Soveraigne Lord the King', a formulation H would surely have followed if he had known of it.

Realm, or be adherent to the Kings Enemies in his Realm, giving to them Aid, and Comfort in the Realm, or elsewhere, and thereof be provably Attainted by open Deed, by People of their Condition. And if a Man Counterfeit the Kings Great, or Privy-Seal, or his Money. And if a Man bring false Money into this Realm Counterfeit to the Money of England, *as the Money called Lush-burgh,*[a] *or other like to the said Money of* England, *knowing the Money to be false, to Merchandize, and make payment in deceit of our said Lord the King, and of his People. And if a Man slay the Chancellor, Treasurer, or the Kings Justices of the one Bench, or the other, Justices in Eyre, or Justices of Assises, and all other Justices Assigned to Hear, and Determine, being in their Places, and doing their Offices. And is to be understood in the Cases above rehearsed, that That ought to be adjudged Treason, which extends to our Royal Lord the King, and his Royal Majesty, and of such Treason the Forfeiture of the Escheats pertains to our Lord the King, as well the Lands and Tenements holden of others as himself. And moreover there is another manner of Treason; that is to say, when a Servant Slayeth his Master, or a Wife her Husband; or when a Man Secular, or Religious slayeth his Prelate, to whom he oweth Faith, and Obedience; and of* [89] *such Treason the Escheats ought to pertain to every Lord of his own Fee. And because many other like Cases of Treason may happen in time to come, which a Man cannot think, nor declare at this present time, it is accorded, that if any Case supposed Treason, which is not above specified, doth happen before any Justices, the Justices shall tarry without giving any Judgment of the Treason till the Cause be shewed, and declared before the King and his Parliament, whether it ought to be adjudged Treason, or other Felony.*

Ph. I desir'd to understand what Treason is, wherein no Enumeration of Facts can give me satisfaction. Treason is a Crime of it self, *Malum in se*, and therefore a Crime at the Common-Law, and High Treason the Highest Crime at the Common-Law that can be: And therefore not the Statute only, but Reason without a Statute makes it a Crime. And this appears by the Preamble, where it is intimated, that all Men, though of divers Opinions did Condemn it by the name of Treason, though they knew not what Treason meant, but were forced to request the King to determine it. That which I desire to know is, how Treason might

[a] Interlinear hyphen.

have been defined without the Statute, by a Man that has no other faculty to make a Definition of it, than by meer Natural Reason. [90]

La. When none of the Lawyers have done it, you are not to expect that I should undertake it on such a sudden.

Ph. You know that *Salus Populi* is *Suprema Lex*; that is to say, the safety of the People, is the highest Law; and that the safety of the People of a Kingdom consisteth in the safety of the King, and of the Strength necessary to defend his People, both against Forraign Enemies, and Rebellious Subjects.[226] And from this I infer, [1.] that to Compass (that is) to design the Death of the then present King, was High Treason before the making of this Statute, as being a Designing of a Civil War, and the Destruction of the People. 2. That the Design to Kill the Kings Wife, or to violate her Chastity, as also to violate the Chastity of the Kings Heir apparent, or of his Eldest Daughter unmarryed, as tending to the Destruction of the certainty of the Kings Issue, and by Consequence [a] raising of Contentions about the Crown, and Destruction of the People in Succeeding time by Civil War, was therefore High Treason before this Statute. 3. That to Levy war against the King within the Realm, and Aiding the Kings Enemies, either within, or without the Realm, are tending to the Kings Destruction, or Disherison, and was High Treason, before this Statute by the Common-Law. 4. That [91] Counterfeiting the principal Seals of the Kingdom, by which the King Governeth his People, tendeth to the Confusion of Government, and Consequently to the Destruction of the People, and was therefore Treason before the Statute. 5. If a Souldier design the Killing of his General, or other Officer in time of Battel, or a Captain Hover doubtfully with his Troops, with intention to gain the Favour of him that shall chance to get the Victory, it tendeth to the Destruction both of King, and People, whether the King be present, or absent, and was High Treason before

[226] 'Salus populi suprema lex esto' [let the safety of the people be the highest law] was the statement at the start of the Twelve Tables, the oldest Roman laws. The tag was frequently cited in 17C political debates, both to defend the royal prerogative of breaking laws in an emergency and to defend the subject's right to fight against a tyrant. It was central to the case for armed resistance worked out by Henry Parker (1604–52), the leading parliamentarian propagandist during the early years of civil war.

[a] < by >

the Statute. 6. If any Man had Imprisoned the Kings Person, he had made him incapable of Defending his People, and was therefore High Treason before the Statute. 7. If any Man had, with design to raise Rebellion against the King, Written, or by words advisedly uttered, denyed the King Regnant to be their Lawful King, he that wrought, Preached, or spoke such words, living then under the Protection of the Kings Laws, it had been High Treason before the Statute for the Reasons aforesaid. And perhaps there may be some other Cases upon this Statute, which I cannot presently think upon; but the Killing of a Justice, or other Officer as is determin'd by the Statute, is not otherwise High Treason, but by the Statute. And to [92] distinguish that which is Treason by the Common-Law, from all other Inferior Crimes; we are to Consider, that if such High Treason should take effect, it would destroy all Laws at once; and being done by a Subject, 'tis a return to Hostility by Treachery; and consequently, such as are Traytors may by the Law of Reason be dealt withal, as Ignoble and Treacherous Enemies; but the greatest of other Crimes, for the most part; are breaches of one only, or at least of very few Laws.

La. Whether this you say be true, or false, the Law is now unquestionable by a Statute made in 1 and 2 of Queen *Mary*,[227] whereby there is nothing to be esteemed Treason, besides those few Offences specially mentioned in the Act of 25 *Ed*. 3.

Ph. Amongst these great Crimes the greatest is that which is Committed by one that has been trusted, and loved by him whose Death he so designeth: For a Man cannot well take heed of those, whom he thinks he hath obliged, whereas an open Enemy gives a Man warning before he Acteth. And this it is for which the Statute hath declared, that it is another kind of Treason, when a Servant killeth his Master, or Mistress, or a Wife killeth her Husband, or a Clerk killeth his Prelate; and I should think it petty Treason[228] also, though it be [93] not within the words of the Statute; when a Tenant in Fee, that holdeth by Homage, and Fealty, shall kill the Lord of his Fee; for Fealty is an Oath of Allegiance to the Lord of the Fee; saving he may not keep

[227] The liberal statute to which H refers is actually 1 Mary st.1 c.1 (SR IV 198); 1&2 Philip & Mary c.9–10 (SR IV 254–6) created new offences.

[228] Petty treason is the technical term for these offences.

his Oath in any thing Sworn to, if it be against the King. For Homage, as it is expressed in a Statute of 17 *Edw.* 2. is the greatest submission that is possible to be made to one Man by another; for the Tenant shall hold his Hands together between the Hands of his Landlord, and shall say thus; [229]I become your Man from this day forth for Life, for Member and for Worldly Honour, and shall owe that my Faith for the Lands that I shall hold of you, saving the Faith that I owe unto our Soveraign Lord the King, and to mine[a] other Lords: Which Homage, if made to the King, is Equivalent to a promise of simple obedience, and if made to another Lord, there is nothing excepted but the Allegiance to the King; and that which is called Fealty, is but the same Confirmed by an Oath.

La. But Sir *Edw. Coke*, 3[b] *Inst*. p. 11. denies that a Traytor is in Legal understanding the Kings Enemy; [230]for Enemies (saith he) be those that be out of the Allegiance of the King; and his Reason is; because, if a Subject joyn with a Forraign Enemy, and come into *England* with him, and be taken Pri-[94]soner here, he shall not be Ransomed, or proceeded with as an Enemy shall, but he shall be taken as a Traytor to the King. Whereas an Enemy coming in open Hostility, and taken, shall either be Executed by Martial-Law, or Ransomed; for he cannot be Indicted of Treason, for that he never was in the Protection and Ligeance of the King, and the Indictment of the Treason saith, *Contra Ligeantiam suam debitam*.[231]

Ph. This is not an Argument worthy of the meanest Lawyer. Did Sir *Edw. Coke* think it impossible[c] for a King Lawfully to kill a Man, by what Death soever without an Indictment, when it is manifestly proved he was his open Enemy?[232] Indictment is a form of Accusation peculiar to *England*, by the Command of some King of *England*, and retained still, and therefore a Law to this Country of *England*; but if it were not Lawful to put a Man to

[229] Quot. to 'mine other Lords' (SR I 227).

[a] many

[b] 4

[230] P/phrase to end of speech (*Third Inst*., 11).

[231] 'Against his due allegiance.'

[c] is possible

[232] Treason breaks natural as opposed to civil law; a traitor should therefore be treated as an enemy and not a criminal (cf. *De C*., xiv 21; *Lev*., 175–6).

Death otherwise than by an Indictment no Enemy could be put to Death at all in other Nations, because they proceed not, as we do, by Indictment. Again, when an open Enemy is taken and put to Death by Judgment of Martial-Law; it is not the Law of the General or Council of War, that an Enemy shall be thus proceeded with, but the Law of the King contained in their Commissions; such as from time to time the Kings have thought fit, in [95] whose Will it always resteth, whether an open Enemy, when he is taken, shall be put to Death, or no, and by what Death; and whether he shall be Ransomed, or no, and at what price? Then for the Nature of Treason by Rebellion; is it not a return to Hostility? What else does Rebellion signifie?[233] *William* the Conqueror Subdued this Kingdom; some he Killed; some upon promise of future obedience he took to Mercy, and they became his Subjects, and swore Allegiance to him; if therefore they renew the War against him, are they not again open Enemies; or if any of them lurking under his Laws, seek occasion thereby to kill him, secretly, and come to be known, may he not be proceeded against as an Enemy, who though he had not Committed what he Design'd, yet had certainly a Hostile Design? Did not the long Parliament declare all those for Enemies to the State that opposed their Proceedings against the late King? But Sir *Edw. Coke* does seldom well distinguish when there are two divers Names for one and the same thing; though one contain the other, he makes them always different, as if it could not be that one and the same Man should be both an Enemy, and a Traytor. But now let us come to his Comment upon this Statute; The Statute says (as it is Printed in *English*) when a Man doth [96] Compass, or Imagine the Death of our Lord the King, *&c*. What is the meaning of the word Compassing, or Imagining?

La. On this place Sir *Edw. Coke* says, that before the making of this Act, *Voluntas reputabatur pro facto*, the Will was taken for the Deed. And so saith *Bracton*, *Spectatur Voluntas, & non Exitus; & nihil interest utrum quis occidat, aut causam praebeat*;[234] That is to

[233] Cf. *Lev*., 166.

[234] 'The will is looked to, and not the outcome; and it matters nothing whether a person kills or provides the cause' (*Third Inst*., 5). The subsequent clarification ('the Cause of the Killing') suggests that H was quoting from memory here; Coke and Bracton (*De legibus*, 136v) both have 'causam *mortis* praebeat' [provides the cause *of the death*: italics added].

say, the Cause of the killing: Now Sir *Edw. Coke* says, this was the Law before the Statute; and that to be a Cause of the killing, [235]is to declare the same by some open Deed tending to the Execution of his Intent, or which might be Cause of Death.

Ph. Is there any *English-man* can understand, that to Cause the Death of a Man, and to declare the same is all one thing?[236] And if this were so, and that such was the Common-Law before the Statute, by what words in the Statute is it taken away?

La. It is not taken away, but the manner how it must be prov'd is thus Determin'd, that it must be prov'd by some open Deed, as providing of Weapons, Powder, Poyson, Assaying[237] of Armour, sending of Letters, *&c*.

Ph. But what is the Crime it self which this Statute maketh Treason? For as I understand the words, To Compass, or Imagine the Kings Death, *&c*. The Compas-[97]sing (as it is in the *English*) is the only thing which is made High Treason; so that not only the killing, but the Design is made High Treason; or as it is in the *French* Record, *Fait Compasser*; That is to say, the causing of others to Compass, or Design the Kings Death is High Treason; and the words *par overt fait*, are not added as a specification of any Treason, or other Crime, but only of the Proof that is requir'd by the Law. Seeing then the Crime is the Design and Purpose to kill the King, or cause him to be killed, and lyeth hidden in the Breast of him that is Accused; what other Proof can there be had of it than words Spoken or Written. And therefore if there be sufficient Witness, that he by words Declared, that he had such a Design, there can be no Question, but that he is Comprehended within this Statute: Sir *Edw. Coke* doth not deny, but that if he Confess this Design, either by Word, or Writing, [a] he is within the Statute.[238] As for that Common saying, that bare words may make a Heretick, but not a Traytor,

[235] Quot. to end of speech (*Third Inst*., 5).

[236] A misunderstanding of Coke: 'the same' refers to the murderer's will, not to the cause of death.

[237] =testing, esp. of metals.

[a] < but that >

[238] 'The wisdome of the makers of this law would not make words only to be Treason, seeing such variety amongst the witnesses are about the same, as few of them agree together. But if the same be set down in writing by the Delinquent himselfe, this is a sufficient overt act within this statute' (*Third Inst*, 14).

which Sir *Edw. Coke* on this occasion maketh use of,[239] they are to little purpose; seeing that this Statute maketh not the words High Treason, but the Intention, whereof the words are but a Testimony: and that Common-saying is false as it is generally Pronounced; for there were [98] divers Statutes made afterwards, though now expir'd, which made bare words to be Treason without any other Deed: As, 1 *El. cap.* 6. & 13. *El. cap.* 1.[240] If a Man should Publickly Preach, that the King were an Usurper, or that the Right of the Crown belonged to any other than the King that Reigned, there is no doubt but it were Treason, not only within this Statute of *E.* 3. but also within the Statute of 1 *Ed.* 6. *c.* 12.[241] which are both still in Force.

La. Not only so; but if a Subject should counsel any other Man to kill the King, Queen, or Heir apparent to the Crown, it would at this day be Judged High Treason; and yet it is no more than bare words. In the third year of King *James, Henry Garnet*, a Jesuit-Priest, to whom some of the Gun-Powder Traytors had Revealed their design by way of Confession, gave them Absolution, without any Caution taken for their desisting from their purpose, or other provision against the danger, and was therefore Condemned, and Executed as a Traytor, though such Absolution were nothing else but bare words.[242] Also I find in the Reports of Sir *John Davis*, Attorney-General for *Ireland*; that in the time of King *Henry* the 6th, a Man was Condemned of Treason, for saying the King was a Natural Fool, and unfit to Govern;[243] but yet this Clause in the Sta-[99]tute of *Edw.* 3. *viz.* That the Compassing there mentioned ought to be proved by some *Overt Act*, was by the Framers of the Statute, not without great Wisdom, and Providence inserted: For as Sir *Edw. Coke* very well observeth, when Witnesses are Examin'd concerning

[239] Ibid.

[240] SR IV 366–7, 526–7 (both references given in Coke's margin).

[241] 1 Edward VI c.4 §5 (SR IV 19–20).

[242] Garnet's conduct was widely discussed. H missed a trick by failing to point out that Coke had prosecuted, a fact he could have gleaned from the epistle dedicatory to 'A Catholicke Devyne' [Robert Parsons], *An Answer to the fifth part of Reports* (1606), a volume in the library at Hardwick (listed in Chatsworth MSS, Hardwick 16* as 'Cooke's Fifth part of Reports Answered').

[243] The story is not in fact found in Davies, *Le primer Report*, but in Sir George Croke's *Reports* (Croke Car., 119: ER LXXIX 705).

words only, they never or very rarely agree precisely about the words they Swear to.[244]

Ph. I deny not but that it was wisely enough done. But the Question is not here of the Treason (which is either Fact, or design) but of the Proof, which, when it is doubtful, is to be Judged by a Jury of 12 Lawful Men: Now whether think you is it a better Proof of a Mans Intention to kill, that he declares that same with his own Mouth, so as it may be Witnessed, or that he provide Weapons, Powder, Poyson, or Assay Arms? If he utter his Design by words, the Jury has no more to do than to consider the Legallity of the Witnesses, the Harmony of their Testimonies, or whether the words were spoken advisedly.[a] For they might have been uttered in a Disputation for Exercise only, or when he that spake them had not the use of Reason, nor perhaps any Design, or wish at all towards the Execution of what he talked of: But how a Jury from providing, or buying of Armour, or buying of Gun-Powder, or from any o-[100]ther overt Act, not Treason in it self, can infer a Design of Murdering the King, unless there appear some words also, signifying to what end he made such Provision, I cannot easily conceive. Therefore as the Jury on the whole matter Words and Deeds shall ground their Judgment concerning Design, or not Design, so, in Reason, they ought to give Verdict. But to come to the Treason of Counterfeiting the Great, or Privy-Seal, seeing there are so many ways for a Cheating Fellow to make use of these Seals, to the Cousening of the King, and his People; why are not all such abuses High-Treason, as well as the making of a false Seal?

La. So they are: For Sir *Edw. Coke* produceth a Record of one that was Drawn, and Hang'd for taking the Great Seal from an expir'd Patent, and fastning it to a Counterfeit Commission to gather Money: But he approveth not the Judgment, because it is the Judgment for Petty Treason; also because the Jury did not find him Guilty of the Offence laid in the Indictment, which was the Counterfeiting of the Great-Seal, but found the special matter, for which the Offender was Drawn, and Hang'd.[245]

[244] *Third Inst*., 14.

[a] ∼.

[245] *Third Inst*., 15.

Ph. Seeing this Crime of taking the Great Seal from one Writing, and fastning it to another was not found High Treason by the [101] Jury, nor could be found upon special matter to be the other kind of Treason mentioned in the same Statute; what ground had either the Jury to find it Treason, or the Judge to pronounce Sentence upon it?

La. I cannot tell. Sir *Edw. Coke* seems to think it a false Record; for hereupon he saith by way of Admonition to the Reader, that [246]hereby it appeareth how dangerous it is to Report a Case by the Ear.

Ph. True; but he does not make it apparent, that this Case was untruly Reported, but on the contrary confesseth, that he had perused the same Record; and a Man may (if it may be done without Proof of the Falsity) make the same Objection to any Record whatsoever. For my part, seeing this Crime produced the same mischief that ariseth from Counterfeiting, I think it reason to understand it as within the Statute: And for the Difference between the Punishments (which are both of them Capital) I think[a] it is not worthy to be stood upon; seeing Death, which is, *Ultimum supplicium*,[247] is a satisfaction to the Law; as Sir *Edw. Coke* himself hath in another place affirm'd.[248] But let us now proceed to other Crimes.

La. Appendent to this is another Crime called Misprision of Treason; which is the Concealing of it by any Man that knows [102] it; and it is called Misprision from the *French Mespriser*, which signifies to contemn, or undervalue;[249] for it is no small Crime in any Subject, so little to take to Heart a known danger to the Kings Person, and Consequently, to the whole Kingdom, as not to discover not only what he knows, but also what he suspecteth of the same, that the Truth therefore may be Examin'd. But for such Discovery, tho the thing prove false, the Discoverer shall not, as I think, be taken for a false Accuser; if for what he directly affirms, he produce a reasonable Proof, and some probability for his Suspition; for else the Concealment will seem justifiable by

[246] Quot. to end of speech (ibid.).

[a] thing

[247] 'The ultimate punishment.'

[248] It is not clear what passage is referred to.

[249] *Third Inst*., 36.

the Interest, which is to every Man allowed in the preservation of himself from pain and dammage.

Ph. This I consent to.

La. All other Crimes meerly Temporal are comprehended under Felony, or Trespass.

Ph. What is the meaning of the word Felony? Does it signifie any thing that is in its own Nature a Crime, or that only which is made a Crime by some Statute? for I remember some Statutes that make it Felony to Transport Horses, and some other things out of the Kingdom; which Transportation before such Statutes made, and after the Repealing of the same, was no greater Crime than any other usual Traffick of a Merchant.[250] [103]

La. Sir *Edw. Coke* derives the word Felony from the Latin word *Fel*, the Gall of a living Creature, and accordingly defines Felony to be an Act done *Animo Felleo*; that is to say, a Bitter a Cruel Act.[251]

Ph. Etymologies are no Definitions, and yet when they are true they give much light towards the finding out of a Definition; but this of Sir *Edw. Coke*'s carries with it very little of Probability; for there be many things made Felony by the Statute-Law, that proceed not from any bitterness of mind at all, and many that proceed from the contrary.

La. This is matter for a Critick, to be pickt out of the knowledge of History and Forraign Languages, and you may perhaps know more of it than I do.

Ph. All that I, or, I think, any other can say in this matter will amount to no more than a reasonable Conjecture, insufficient to sustain any point of Controversie in Law. The word is not to be found in any of the old *Saxon* Laws, set forth by Mr. *Lambert*, nor in any Statute Printed before that of *Magna Charta*; there it is found.[252] Now *Magna Charta* was made in the time of *Hen*. the

[250] H had no need to explain to contemporary readers that felonies were by definition capital offences; here he was drawing attention to the fact that routine commercial behaviour could be punishable by death. 23 Henry VIII c.16 (SR III 380–1), revived by 1 Elizabeth c.7 (SR IV 367), had made exporting horses to the Scots into a felony.

[251] Spelman, *Glossarium*, s.v. 'Felo' gives a different derivation, but this is still regarded by OED as 'the most probable' etymology.

[252] In chapter xxii (*Second Inst*., 36). H found the Saxon laws in William Lambarde, *Archaionomia, sive de priscis Anglorum legibus*, first printed in 1568. The 'statutes printed before Magna Charta' are probably the laws of William I and Henry I printed in the second edition of 1644.

3d,[253] Grand-Child to *Hen.* the 2d, Duke of *Anjou*, a *French-man* born, and bred in the Heart of *France*, whose Language might very well retain many words [104] of his Ancestors the *German-Franks*, as ours doth of the *German-Saxons*; as also many words of the Language of the *Gaules*, as the *Gaules* did retain many words of the *Greek* Colonie planted at *Marseilles*. But certain it is the *French* Lawyers at this day use the word Felon, just as our Lawyers use the same; whereas the Common People of *France* use the word *Filou* in the same sence; but *Filou* signifieth not the Man that hath committed such an Act, as they call Felony; but the Man that maketh it his Trade to maintain himself by the breaking and contemning of all Laws generally; and comprehendeth all those unruly People called Cheaters, Cut-purses, Pick-locks, Catch-Cloaks, Coyners of false Money, Forgers, Thieves, Robbers, Murderers, and whosoever make use of Iniquity on Land, or Sea, as a Trading, or Living. The *Greeks* upon the Coast of *Asia*, where *Homer* liv'd, were they that Planted the Colony of *Marseilles*; they had a word that signified the same with Felon, which was φιλήτης, Filetes, and this *Filetes* of *Homer* signifies properly the same that a Felon signifies with us: And therefore *Homer* makes *Apollo* to call *Mercury* φιλήτην *Fileteen*, and ἄρχος φιλήτων;[254] I insist not upon the truth of this Etymologie; but it is certainly more rational than the *Animus Felleus* of Sir *Edw. Coke*. And for the mat-[105]ter it self it is manifest enough, that which we now call Murder, Robbery, Theft, and other practices of Felons, are the same that we call Felony, and Crimes in their own nature without the help of Statute. Nor is it the matter of punishment that distinguisheth the nature of one Crime from another; but the mind of the Offender and the Mischief he intendeth, considered together with the Circumstances of Person, Time, and Place.

La. Of Felonies, the [greatest] Crime is Murder.[255]

Ph. And what is Murder?

La. Murder is the Killing of a Man upon Malice forethought, as by a Weapon, or by Poyson, or any way, if it be done, upon Antece-

[253] When 17C writers referred to Magna Charta, they usually meant the charter of 9 Henry III (1225), not King John's of 1215.

[254] 'Prince of thieves.' Homer, *Hymns*, 384. The same passage is referred to at *Lev.*, 45.

[255] *Third Inst.*, 47.

dent Meditation, or thus, Murder is the Killing of a Man in cold Blood.

Ph. I think there is a good definition of Murder set down by Statute, 52 *Hen*. 3. *cap*. 25 in these words: [256]Murder from henceforth shall not be Judged before our Justices, where it is found misfortune only, but it shall take place in such as are slain by Felony. And Sir *Edw. Coke* Interpreting this Statute, 2 *Inst*. p. 148. saith; [257]That the mischief before this Statute was, that he that Killed a Man by misfortune, as by doing any Act that was not against Law, and yet against his Intent, if the Death of a Man ensued, this was adjudged Murder. But I [106] find no Proof that he alledgeth, nor find I any such Law among the Laws of the *Saxons*, set forth by Mr. *Lambert*.[258] For the word, it is (as Sir *Edw. Coke* noteth)[259] old *Saxon*, and amongst them it signified no more than a Man slain in the Field, or other place, the Author of his death not known. And according hereunto, *Bracton*, who lived in the time of *Magna Charta*, defineth it *fol*. 134, thus; Murder is the secret killing of a Man, when none besides the killer, and his Companions saw, or knew it; so that it was not known who did it, nor fresh-suit[260] could be made after the doer;[261] therefore every such killing was called Murder before it could be known whether it could be by Felony, or not: For a Man may be found dead that kills himself, or was Lawfully kill'd by another. This name of Murder came to be the more horrid, when it was secretly done, for that it made every Man to consider of their own danger, and him that saw the dead Body to boggle[262] at it, as a Horse will do at a dead Horse; and to prevent the same they had Laws in force to Amerce[263] the Hundred where it was done, in a sum defined by Law to be the Price of his Life: For in

[256] Quot. to 'Felony' (SR I 25).

[257] Quot. to 'Murder' (*Second Inst*., 148).

[258] Lambarde, *Archaionomia*.

[259] *Third Inst*., 47.

[260] Pursuit 'made or levied immediately or after a short prescribed interval' (OED s.v. 'fresh' A2c; cf. *Termes de la ley*, 379–80).

[261] Murdrum . . . est occulta extraneorum & notorum hominum occisio, à manu hominis nequiter perpetrata, & quae nullo sciente vel vidente facta est, praeter solum interfectorem & suos coadjutores & fautores, & ita quod non statim assequatur clamor popularis (*Bracton*, 134v).

[262] =to start with fright (OED).

[263] =fine.

those dayes the lives of all sorts of Men were valued by Money; and the value set down in their Written Laws.[264] And therefore Sir *Edw. Coke* was mistaken in that he [107] thought that killing a Man by misfortune before the Statute of *Marlebridge* was adjudged Murder,[265] and those secret Murders were abominated by the People, for that they were lyable to so great a Pecuniary Punishment for suffering the Malefactor to escape. But this grievance was by *Canutus*, when he Reign'd, soon eased: For he made a Law, that the Countrey in this Case, should not be Charged, unless he were an *English-man* that was so slain; but if he were a *French-man* (under which name were comprehended all Forraigners, and especially the *Normans*) though the slayer escaped, the County was not to be Amerced.[266] And this Law, though it were very hard, and Chargeable when an *English-man* was so slain, for his Friend to prove he was an *English-man*, and also unreasonable to deny the Justice to a stranger; yet was it not Repealed till the 14th of King *Ed.* the 3d.[267] By this you see that Murder is distinguished from Homicide by the Statute-Laws, and not by any Common-Law without the Statute; and that it is comprehended under the general name of Felony.

La. And so also is Petit Treason, and I think so is High Treason also; for in the abovesaid Statute in the 25 *Ed.* 3d. Concerning Treasons there is this Clause. [268]And because that many other like Cases of Trea-[108]son, may happen in time to come, which a Man cannot think, or declare at the present time; it is accorded, that if any other Case, supposed Treason which is not above specified, doth happen before any the Justices, the Justices shall tarry without any going to Judgment of the Treason, till the Cause be shewed, and declared before the King and his Parliament whether it be Treason, or other Felony; which thereby shews that the King and Parliament thought that Treason was one of the sorts of Felony.

Ph. And so think I.

[264] e.g. Lambarde, *Archaionomia*, 4–6, 12, 28–9. For the contemporary state of knowledge of this subject, see Spelman, *Glossarium*, s.v. 'Wergildus'.

[265] *Second Inst.*, 148–9.

[266] H got this well-known fact the wrong way round; the county was fined unless the corpse was demonstrably English (*Termes de la ley*, 308–9; Bracton, *De legibus*, 1340–135v).

[267] 14 Edward III st.1 c.4 (SR I 282).

[268] Quot. to 'other Felony' (*Third Inst.*, 21).

La. But Sir *Edw. Coke* denies it to be so at this day; for 1 *Inst. Sect.* 745. at the word Felony, he saith; [269]That in Antient time this word Felony was of so large an extent, as that it included High Treason—But afterwards it was resolved, that in the Kings Pardon, or Charter, this word Felony should extend only to Common Felonies—And at this day, under the word Felony by Law is included Petit Treason, Murder, Homicide, burning of Houses, Burglary, Robbery, Rape, *&c*. Chance-medley,[270] *se defendendo*, and *Petit Larceny*.

Ph. He says it was resolv'd, but by whom?

La. By the Justices of Assize in the time of *Hen*. 4. as it seems in the Margin [109]

Ph. Have Justices of Assize any Power by their Commission to alter the Language of the Land, and the received sence of words? Or in the Question in what Case Felony shall be said, [is it][a] referred to the Judges to Determine; as in the Question in what Case Treason shall be said it is referred by the Statute of *Edw*. the 3d. to the Parliament?[271] I think not; and yet perhaps they may be disobliged[272] to disallow a Pardon of Treason, when mentioning all Felonies it nameth not Treason, nor specifies it by any description of the Fact.

La. Another kind of Homicide there is simply called so, or by the name of Man-slaughter,[b] and is not Murder, and that is when a Man kills another Man upon suddain Quarrel, during the heat of Blood.

Ph. If two meeting in the Street chance to strive who shall go nearest to the Wall, and thereupon Fighting, one of them kills the other, I believe verily he that first drew his Sword did it of Malice forethought, though not long forethought; but whether it be Felony or no, it may be doubted. It is true, that the harm done is the same as if it had been done by Felony; but the wickedness of the Intention was nothing near so great. And supposing it had been done by Felony, then 'tis manifest by the Statute of

[269] P/phrase to end of speech (*First Inst*., 391a). See also below, p.121.

[270] =homicide 'upon a sudden occasion' (*Third Inst*., 55; cf. *Termes de la ley*, 115).

[a] it is

[271] 25 Edward III st.5 c.2 (SR I 320).

[272] =released from obligation (OED I). *Moral works* and EW substitute 'obliged', but the adversative 'and yet' demands an example of something that is left to the judges' discretion.

[b] Interlinear hyphen.

Marlebridge, that it was very Murder. And [110] when a Man for a word, or a trifle shall draw his Sword, and kill another Man, can any Man imagine that there was not some Precedent Malice?

La. 'Tis very likely there was Malice more or less, and therefore the Law hath Ordained for it a punishment equal to that of Murder, saving that the Offender shall have the Benefit of his Clergy.

Ph. The Benefit of Clergy comes in upon another account, and importeth not any extenuation of the Crime; for it is but a Relick of the old usurped Papal priviledge, which is now by many Statutes so pared off, as to spread but to few Offences, and is become a Legal kind of Conveying Mercy, not only to the Clergy, but also to the Laity.[273]

La. The work of a Judge you see is very difficult, and requires a Man that hath a faculty of well distinguishing of Dissimilitudes of such Cases as Common Judgments think to be the same. A small Circumstance may make a great Alteration, which a Man that cannot well discern, ought not to take upon him the Office of a Judge.

Ph. You say very well; for if Judges were to follow one anothers Judgments in Precedent Cases, all the Justice in the World would at length depend upon the Sentence of a few Learned, or Unlearned, ignorant [111] Men, and have nothing at all to do with the Study of Reason.[274]

La. A Third kind of Homicide is when a Man kills another, either by misfortune, or in a necessary defence of himself, or of the King, or of his Laws; for such killing is neither Felony, nor Crime, saving (as Sir *Edw. Coke* says, 3[a] *Inst*. p. 56.) [275]that if the Act that a Man is a doing when he kills another Man be Unlawful, then it is Murder. As if *A*. meaneth to steal a Deer in the Park of *B*. Shooteth at the Deer, and by the glance of the Arrow killeth a Boy that is hidden in a Bush; this is Murder, for that the Act was Unlawful; but if the owner of the Park had done the like, shooting at his own Deer, it had been by Misadventure, and no Felony.

[273] By about 1500, the privilege of benefit of clergy had been extended to the literate layman. Over the next two centuries, progressively more offences were excluded (Holdsworth, *History*, III 292–301).

[274] Cf. *El*., II x 10; *De C*., xiv 15; *Lev*., 50, 144.

[a] 4

[275] P/phrase to end of speech (*Third Inst*, 56).

Ph. This is not so distinguished by any Statute, but is the *Commentary*[a] only of Sir *Ed. Coke*. I believe not a word of it. If a Boy be Robbing an Apple-tree, and falling thence upon a Man that stands under it, and breaks his Neck, but by the same chance saveth his own Life, Sir *Edw. Coke*, it seems, will have him Hanged for it, as if he had fallen of prepensed Malice. All that can be called Crime in this Business is but a simple Trespass, to the dammage perhaps of sixpence or a shilling. I confess the Trespass was an Offence against the Law, but the falling was [112] none, nor was it by the Trespass, but by the falling that the Man was slain; and as he ought to be quit of the killing, so he ought to make Restitution for the Trespass. But I believe the Cause of Sir *Edw. Coke*'s mistake was his not well understanding of *Bracton*, whom he cites in the Margin: For 120b[b] he saith thus: *Sed hic erit distinguendum, utrum quis dederit operam rei licitae, vel illicitae; si illicitae, ut si lapidem projiciebat quis versus locum per quem consueverunt homines transitum facere, vel dum insequitur equum, vel bovem, & aliquis ab equo, vel a bove percussus fuerit, & huiusmodi, hoc imputatur ei, i.e.*[276] But here we are to distinguish whether a Man be upon a Lawful, or Unlawful business; if an unlawful, as he that throws a stone into a place, where Men use to pass; or if he chase a Horse, or an Ox, and thereby the Man be stricken by the Horse, or the Ox, this shall be imputed to him: And it is most reasonable: For the doing of such an unlawful Act as is here meant, is a sufficient Argument of a Felonious purpose, or at least a hope to kill some body, or other, and he cared not whom; which is worse than to design the death of a certain Adversary, which nevertheless is Murder. Also on the contrary, though the business the Man is doing be Lawful, and it chanceth sometimes that a Man be slain [113] thereby; yet may such killing be Felony. For if a Car-Man drive his Cart through *Cheapside* in a throng of People, and thereby he kill a Man; though he bare him no Malice, yet because he saw there was very great danger, it may reasonably be inferr'd, that he meant to adventure the killing of some body, or other, though not of him that was kill'd.

[a] *Commonly*

[b] 1206

[276] Bracton, *De legibus*, 120v–121r.

La. He is a Felon also that killeth himself voluntarily, and is called, not only by Common Lawyers, but also in divers Statute-Laws, *Felo de se*.[277]

Ph. And 'tis well so: For names imposed by Statutes are equivalent to Definitions; but I conceive not how any Man can bear *Animum felleum*, or so much Malice towards himself, as to hurt himself voluntarily, much less to kill himself; for naturally, and necessarily the Intention of every Man aimeth at somewhat, which is good to himself, and tendeth to his preservation: And therefore, methinks, if he kill himself, it is to be presumed that he is not *compos mentis*, but by some inward Torment or Apprehension of somewhat worse than Death, Distracted.[278]

La. Nay, unless he be *compos mentis* he is not *Felo de se* (as Sir *Edw. Coke* saith, 3[a] *Inst*. p. 54.) and therefore he cannot be Judged a *Felo de se*, unless it be first proved he was *compos mentis*. [114]

Ph. How can that be proved of a Man dead; especially if it cannot be proved by any Witness, that a little before his death he spake as other Men used to do. This is a hard place; and before you take it for Common-Law it had need to be clear'd.

La. I'le think on't. There's a Statute of 3 *Hen*. 7. *c*. 14. which makes it Felony in any of the Kings Houshold-Servants under the degree of a Lord, to Compass the Death of any of the Kings Privy-Council. The words are these; [279]That from henceforth the Steward, Treasurer, and Controuler of the Kings House for that time being, or one of them, have full Authority and Power, to inquire by 12 sad men, and discreet Persons of the Chequer-Roll of the King's Honourable Houshold. If any Servant, admitted to [be] his Servant Sworn, and his name put into the Chequer-Roll, whatsoever he be serving in any manner, Office, or Room, reputed, had, or taken under the State of a Lord, make any Confederacies, Compassings, Conspiracies, or Imaginations with any Person to Destroy, or Murder the King, or any Lord of this Realm, or any other Person sworn to the Kings Council, Steward, Treasurer, or Controuler of the Kings House. And if

[277] It is not clear what statutes are referred to; the principles directly relevant to the crime of *felo de se* derive from common law (Stephen, *History of criminal law*, III 104–5; Macdonald and Murphy, *Sleepless souls*, 15–28).

[278] =sent out of his mind. On suicide, cf. *Beh*., 153–4 (EW VI 281).

[a] 4

[279] Quot. and p/phrase to end of speech (3 Henry VII c.14 : SR II 521–2).

such Misdoers shall be found Guilty by Confession, or otherwise, that the said Offence shall be Judged Felony. [115]

Ph. It appears by this Statute, that not only the Compassing the Death (as you say) of a Privy-Councellor, but also of any Lord of this Realm is Felony; if it be done by Any of the Kings Houshold Servants that is not a Lord.

La. No; Sir *Edw. Coke* upon these words, any Lord of this Realm, or other Person Sworn of the Kings Council infers 3[a] *Inst*. p. 38. that is to be understood of such a Lord only as is a Privy-Councellor.[280]

Ph. For barring of the Lords of Parliament from this Priviledge, he strains this Statute a little farther (in my Opinion) than it reacheth of it self. But how are such Felonies to be Tryed?

La. The Indictment is to be found, before the Steward, Treasurer, and Controuler of the Kings House, or one of them, by 12 of the Kings Houshold Servants. The Petit Jury for the Tryal must be 12 other of the Kings Servants, and the Judges are again the Steward, Treasurer, and Controuler of the Kings House, or 2 of them; and yet I see that these Men are not usually great Students of the Law.

Ph. You may hereby be assur'd, that either the King and Parliament were very much overseen[281] in choosing such Officers perpetually for the time being, to be Judges in a Tryal at the Common-Law, or else [116] that Sir *Edw. Coke* presumes too much, to appropriate all the Judicature, both in Law, and Equity, to the Common-Lawyers; as if neither Lay-Persons, Men of Honour, nor any of the Lords Spiritual, who are the most versed in the Examination of Equity, and Cases of Conscience, when they hear the Statutes Read, and Pleaded, were unfit to Judge of the intention and meaning of the same. I know, that neither such great Persons, nor Bishops have ordinarily so much spare time from their ordinary Employment as to be so skilful as to Plead Causes at the Bar; but certainly they are, especially the Bishops, the best able to Judge of matters of Reason; that is to say (by Sir *Edw. Coke*'s Confession)[282] of matters (except of Blood) at the Common-Law.

[a] 4

[280] *Third Inst*., 38.

[281] =mistaken.

[282] H is presumably referring to the Cokean principle that common law is reason, not the unCokean belief that bishops are the best equipped to judge.

La. Another sort of Felony, though without Man-slaughter, is Robbery; and by Sir *Edw. Coke*, 3[a] *Inst*. p. 68. defined thus, Robbery by the Common-Law is [283]a Felony committed by a violent Assault upon the Person of another, by putting him in fear, and taking away from him his Money, or other Goods of any value whatsoever.

Ph. Robbery is not distinguished from Theft by any Statute. *Latrocinium* comprehendeth them both, and both are Felony, and both Punished with Death. And therefore to distinguish them aright is the work [117] of Reason only. And the first difference which is obvious to all Men, is, that Robbery is committed by Force, or Terror, of which neither is in Theft; for Theft is a secret Act, and that which is taken by violence, or Terror, either from his Person, or in his Presence is still Robbery; but if it be taken secretly, whether it be by day, or night from his Person, or from his Fold, or from his Pasture, then it is called Theft. 'Tis Force and Fraud only that distinguisheth between Theft, and Robbery, both which are by the Pravity only of the Intention, Felony, in their Nature. But there be so many Evasions of the Law found out by evil Men, that I know not in this Predicament[284] of Felony how to place them: For suppose I go secretly by day, or night, into another Mans Field of Wheat Ripe, and standing, and Loading my Cart with it I carry it away; Is it Theft, or Robbery?

La. Neither; it is but Trespass: But if you first lay down the Wheat you have cut, and then throw it into your Cart, and carry it away, then it is Felony.

Ph. Why so?

La. Sir *Edw. Coke* tells you the Reason of it, 3[a] *Inst*. p. 107. for he defineth Theft to be by the Common-Law [285]a Felonious, and fraudulent taking and carrying away by any Man, or Woman, of the meer Personal Goods[286] [118] of another, not from the Person, nor by night in the House of the owner. From this Definition he Argues thus, p. 109. [287]Any kind of Corn, or Grain

[a] 4
[283] Quot. to end of speech (*Third Inst*., 68).
[284] =category.
[b] 4
[285] Quot. to 'owner' (*Third Inst*., 107).
[286] As opposed to their real property.
[287] Quot. to end of speech (*Third Inst*., 109).

growing upon the ground is a Personal Chattel, and the Executors of the owner shall have them, though they be not severed; but yet no Larceny can be Committed of them, because they are annexed to the Realty: So it is of Grass standing on the Ground, or of Apples, or of any Fruit upon the Trees, *&c.* So it is of a Box, or Chest of Charters, no Larceny can be committed of them, because the Charters concern the Realty, and the Box, or Chest, though it be of great value, yet shall it be of the same nature the Charters are of. *Omne magis dignum trahit ad se minus.*[288]

Ph. Is this Definition drawn out of any Statute, or is it in *Bracton*, or *Littleton*, or any other Writer upon the Science of the Laws?

La. No; it is his own;[289] and you may observe by the Logick-Sentences dispersed through his Works, that he was a Logician sufficient enough to make a Definition.

Ph. But if his Definitions must be the Rule of Law; what is there that he may not make Felony, or not Felony, at his Pleasure? But seeing it is not Statute-Law that he says, it must be very perfect Reason, or [119] else no Law at all; and to me it seems so far from Reason as I think it ridiculous. But let us Examine it. There can (says he) be no Larceny of Corn, Grass, or Fruits that are growing, that is to say, they cannot be stolen; but why? Because they concern the Realty; that is, because they concern the Land. 'Tis true that the Land cannot be stolen, nor the right of a Mans Tenure; but Corn, and Trees, and Fruit, though growing, may be cut down, and carryed away secretly, and Feloniously, in Contempt, and Despight of the Law. And are they not then stolen? And is there any Act which is Feloniously committed, that is not more than Trespass? Can any Man doubt of it that understands the *English* Tongue? 'Tis true, that if a Man pretend a right to the Land, and on that pretence take the Fruits thereof by way of taking Possession of his own, it is no more than a Trespass, unless he conceal the taking of them; for in that one Case, he but puts the Man that was in Possession before to exhibit his complaint, which purpose is not Felonious, but Lawful; for nothing makes a distinction

[288] Everything that is more worthy draws to itself that which is less.

[289] Not so; this was a very well-known maxim, cited as such in a famous report by Plowden on the Elizabethan 'Case of Mines' (1 Plowden 323: ER LXXV 492). Cf. also, in a work attributed to William Noy (d.1634): 'Maius dignum trahit [ad] se minus dignum. As the Writings, the Chest or Box they are in' (Noy, *Grounds and maximes*, 7).

between Felony, and not Felony, but the purpose. I have heard that if a Man slander another with stealing of a Tree standing, there lies no Action for it, and that upon this ground, To steal a standing Tree is impossi-[120]ble; and that the Cause of the Impossibility is, that a Man's Free-hold cannot be stolen;[290] which is a very obvious Fallacy; for Free-hold signifieth, not only the Tenement, but also the Tenure; and though it be true that a Tenure cannot be stolen, yet every Man sees the standing Trees, and Corn, may easily be stolen; and so far forth as Trees, *&c.* are part of the Freehold, so far forth also they are Personal Goods; for whatsoever is Freehold is Inheritance, and descendeth to the Heir, and nothing can descend to the Executors, but what is meerly Personal. And though a Box, or Case of Evidences are to descend to the Heir, yet unless you can shew me positive Law to the contrary, they shall be taken into the Executors hands, to be delivered to the Heir. Besides, how unconscionable a thing is it, that he that steals a shillings worth of Wood; which the Wind hath blown down, or which lyeth Rotten on the ground, should be Hang'd for it, and he that takes a Tree worth 20 or 40 shillings, should Answer only for the Dammage?

La. 'Tis somewhat hard, but it has been so practised time out of mind. Then follows Sodomy, and Rape, both of them Felonies.

Ph. I know that, and that of the former he justly says it is detestable, being in a man-[121]ner an Apostacie from Humane Nature:[291] But in neither of them is there any thing of *Animus Felleus*. The Statutes which make them Felony are exposed to all Mens reading; but because Sir *Edw. Coke*'s Commentaries upon them are more diligent and Accurate than to be free from all uncleanness, let us leap over them both, observing only by the way, that he leaves an Evasion for an impotent Offender, though his design be the same, and pursued to the utmost of his Power.[292]

La. Two other great Felonies are breaking, and Burning of Houses, neither of which are defin'd by any Statute. The former of them is by Sir *Edw. Coke*. 3[a] *Inst*. p. 63. Defined thus: [293]Burglary is by

[290] On this piece of law, see Sheppard, *Action upon the case for slander*, 51, 53.

[291] Cf. *El.*, II ix 3.

[292] Coke does not make this point explicitly; he does however state that penetration is a defining feature of these crimes (*Third Inst.*, 58–60).

[a] 4

[293] Quot. to 'or not' (*Third Inst.*, 63).

the Common-Law, the Breaking and Entring into the Mansion-house of another, in the night with intent to kill some reasonable Creature, or to commit some other Felony within the same, whether his intent be executed, or not; and defineth Night to be then, when one Man cannot know anothers Face by daylight[a]: [294] And for the parts of a Mansion-house he reckoneth all Houses that belong to Housekeeping, as Barns, Stables, Dary-Houses, Buttery, Kitchin, Chambers, *&c.*[295] But breaking of a House by day, though Felony, and Punished as Burglary, is not within the Statute.[296] [122]

Ph. I have nothing to say against his Interpretations here, but I like not that any private Man should presume to determine, whether such, or such a Fact done be within the words of a Statute or not, where it belongs only to a Jury of 12 Men to declare in their Verdict, whether the Fact laid open before them be Burglary, Robbery, Theft, or other Felony; for this is to give a leading Judgment to the Jury, who ought not to consider any private Lawyers Institutes, but the Statutes themselves pleaded before them for directions.[297]

La. Burning, as he defines it, p. 66. [298]is a Felony at the Common-Law committed by any that maliciously and voluntarily in the night, or day, burneth the House of another: And hereupon infers, if a Man sets Fire to the House, and it takes not, that then it is not within the Statute.[299]

Ph. If a Man should secretly, and maliciously lay a Quantity of Gun-Powder under another Mans House, sufficient to Blow it up, and set a Train of Powder in it, and set Fire to the Train, and some Accident hinder the Effect, is not this Burning? or what is it? What Crime? It is neither Treason, nor Murder, nor Burglary, nor Robbery, nor Theft, nor (no dammage being made) any

[a] day-light: interlinear hyphen.

[294] *Third Inst.*, 63.

[295] Ibid., 64.

[296] As H has just remarked that burglary is not defined by statute, this is a puzzling statement. If he in fact said 'statute', he may have been referring to 23 Henry VIII c.1 §1 (SR III 362) and 5 & 6 Edward VI c.9 (SR IV 142–3), enactments removing benefit of clergy from some varieties of burglary (*Third Inst.*, 65). A similar puzzle is raised by his views about burning (see below, at n. 299).

[297] Cf. *Lev.*, 146.

[298] Quot. to 'of another', (*Third Inst*, 66).

[299] The same slip as at n. 296; burning was not defined by any statute

Trespass, nor contrary to any Statute. And yet (seeing the Common-Law is the [123] Law of Reason) it is a sin, and such a sin as a Man may be Accused of, and Convicted, and consequently a Crime committed of Malice prepensed; shall he not then be Punished for the Attempt? I grant you that a Judge has no Warrant from any Statute-Law, Common Law, or Commission to appoint the Punishment, but surely the King has power to Punish him (on this side of Life or Member) as he please; and with the Assent of Parliament (if not without) to make the Crime for the future Capital.

La. I know not. Besides these Crimes there is Conjuration, Witchcraft, Sorcery and Inchantment, which are Capital by the Statute, 1 of King *James, cap*. 12.[300]

Ph. But I desire not to discourse of that Subject; for though without doubt there is some great Wickedness signified by these Crimes; yet I have ever found my self too dull to conceive the nature of them, or how the Devil hath power to do many things which Witches have been Accused of.[301] Let us now come to Crimes not Capital.[302]

La. Shall we pass over the Crime of Heresie, which Sir *Edw. Coke* ranketh before Murder, but the consideration of it will be somewhat long.

Ph. Let us defer it till the Afternoon. [124]

Herejia
Of Heresie.

La. Concerning Heresie, Sir *Edw. Coke*, 3[a] *Inst*. p. 39. says, [303]that 5 things fall into consideration. 1. Who be the Judges of Heresie. 2. What shall be Judged Heresie. 3. What is the Judgment upon

[300] *Third Inst*., 44–7; 1 Jac. c.12 (SR IV 1028–9).

[301] 'As for Witches, I think not that their witchcraft is any reall power; but yet that they are justly punished, for the false beliefe they have, that they can do such mischiefe, joyned with their purpose to do it if they can' (*Lev*., 7; cf. *De H*., xiv 12: OL II 127). H's friend Selden took a similar view (Selden, *Table talk*, 140).

[302] H reverts to the question of crimes not capital at the end of the heresy section (p. 103); the clumsy transition suggests that the whole passage may post-date the rest of the book. Cf. the similar shift at p. 119 below.

[a] 4

[303] Quot. to end of speech (*Third Inst*., 39).

a Man Convicted of Heresie. 4. What the Law alloweth him to save his Life. 5. What he shall forfeit by Judgment against him.

Ph. The principal thing to be considered, which is the Heresie it self, he leaveth out; *viz*. What it is, in what Fact, or Words it consisteth, what Law it violateth, Statute-Law, or the Law of Reason. The Cause why he omitteth it, may perhaps be this; that it was not only out of his Profession, but also out of his other Learning. Murder, Robbery, Theft, *&c*. Every Man knoweth to be evil, and are Crimes defined by the Statute-Law, so that any Man may avoid them, if he will. But who can be sure to avoid Heresie, if he but dare to give an Account of his Faith, unless he know beforehand what it is?

La. In the Preamble of the Statute of the 2d, *Hen*. 4. *cap*. 15. Heresie is laid down, as a Preaching or Writing of such Doctrine, as is contrary to the determination of Holy Church.[304] [125]

Ph. Then it is Heresie at this day to Preach, or Write against Worshipping of Saints, or the Infallibility of the Church of *Rome*, or any other determination of the same Church: For Holy-Church, at that time, was understood to be the Church of *Rome*, and now with us the Holy-Church I understand to be the Church of *England*; and the Opinions in that Statute are now, and were then the true Christian Faith. Also the same Statute of *Hen*. 4. Declareth, by the same Preamble, that the Church of *England* had never been troubled with Heresie.

La. But that Statute is Repeal'd.[305]

Ph. Then also is that Declaration, or Definition of Heresie repeal'd.

La. What, say you, is Heresie?

Ph. I say Heresie is a singularity of Doctrine, or Opinion contrary to the Doctrine of another Man, or Men, and the word properly signifies the Doctrine of a Sect, which Doctrine is taken upon Trust of some Man of Reputation for Wisdom, that was the first Author of the same.[306] If you will understand the truth hereof, you are to Read the Histories and other Writings of the Antient *Greeks*, whose word it is, which Writings are extant in these days, and easie to be had. Wherein you will find, that in, and a little

[304] 2 Henry IV c.15 (SR II 125–8).

[305] By 1 Edward VI c.12 §2 (SR IV 19) and then, after its revival by Queen Mary, by 1 Eliz c.1 §6 (SR IV 351–2).

[306] Cf. *Lat Lev*., 346–7 (OL III 540); *Beh*., 13–14 (EW VI 174); *Hist. Narr*., 136 (EW IV 388).

before the time of *Alexander* the [126] Great; there lived in *Greece* many Excellent Wits, that employed their time in search of the Truth in all manner of Sciences worthy of their Labour, and which to their great Honour and Applause published their Writings; some concerning Justice, Laws, and Government, some concerning Good, and Evil Manners, some concerning the Causes of things Natural, and of Events discernable by sense; and some of all these Subjects. And of the Authors of these, the Principal were *Pythagoras, Plato, Zeno, Epicurus* and *Aristotle*, Men of deep and laborious Meditation, and such as did not get their Bread by their Philosophy, but were able to live of their own, and were in Honour with Princes, and other great Personages. But these Men, though above the rest in Wisdom, yet their Doctrine in many points did disagree; whereby it came to pass, that such Men as studied their Writings, inclined, some to *Pythagoras*, some to *Plato*, some to *Aristotle*, some to *Zeno*, and some to *Epicurus*. But Philosophy it self was then so much in Fashion, as that every Rich Man endeavour'd to have his Children educated in the Doctrine of some, or other of these Philosophers, which were for their Wisdom so much renown'd. Now those that followed *Pythagoras*, were called *Pythagoreans*; those that followed *Plato, Academicks*; those that [127] followed *Zeno, Stoicks*; those that followed *Epicurus, Epicureans*, and those that followed *Aristotle, Peripateticks*, which are the names of Heresie in *Greek*, which signifies no more but taking of an Opinion; and the said *Pythagoreans, Academicks, Stoicks, Peripateticks, &c.* were termed by the names of so many several Heresies.[307] All Men (you know) are subject to Error, and the ways of Error very different; and therefore 'tis no wonder if these Wise, and diligent searchers of the Truth did, notwithstanding their Excellent parts, differ in many points amongst themselves. But this Laudable Custom of Great, Wealthy Persons to have their Children at any price to learn Philosophy, suggested to many idle and needy Fellows, an easie and compendious way of Maintenance; which was to Teach the Philosophy, some of *Plato*, some of *Aristotle, &c.* Whose Books to that end they Read over, but without Capacity, or much Endeavour to examine the Reasons of their Doctrines, taking only the Conclusions, as they lay; and setting

[307] Cf. *Beh.*, 14 (EW VI 174); *Hist. Narr.*, 135–7 (EW IV 387–8).

up with this, they soon professed themselves Philosophers, and got to be the School-Masters to the Youth of *Greece*; but by Competition for such Employment, they hated and reviled one another with all the bitter Terms they could invent; and very often, when upon Occa-[128]sion they were in Civil Company, fell first to Disputation, and then to Blows, to the great trouble of the Company, and their own shame. Yet amongst all their reproachful words the name of Heretick came never in, because they were all equally Hereticks, their Doctrine not being theirs, but taken upon Trust from the aforesaid Authors. So that though we find Heresie often mentioned in *Lucian*,[308] and other Heathen Authors, yet we shall not find in any of them *Haereticus* for a Heretick. And this Disorder among the Philosophers continued a long time in *Greece*, and Infecting also the *Romans*, was at the greatest in the times of the Apostles, and in the Primitive Church, till the time of the Nicene Council, and somewhat after. But at last[309] the Authority of the *Stoicks* and *Epicureans* was not much Esteemed, only *Plato*'s and *Aristotle*'s Philosophy were much in Credit; *Plato*'s with the better sort, that founded their Doctrine upon the Conceptions and Ideas of things, and *Aristotle*'s with those that reasoned only from the names of Things, according to the Scale of the *Categories*:[310] Nevertheless there were always, though not New Sects of Philosophy, yet New Opinions continually arising. [129]

La. But how came the word Heretick to be a Reproach?

Ph. Stay a little. After the Death of our Saviour his Apostles, and his Disciples, as you know, dispersed themselves into several parts of the World to Preach the Gospel, and converted much People, especially in *Asia* the less, in *Greece* and *Italy*, where they Constituted many Churches; and as they Travelled from place to place, left Bishops to Teach and Direct those their Converts, and to appoint Presbyters under them to Assist them therein, and to Confirm them by setting forth the Life, and Miracles of our Saviour, as they had receiv'd it from the Writings of the Apostles and Evangelists; whereby (and not by the Authority of *Plato*, or

[308] H is thinking particularly of Lucian's dialogue *Hermotimus* or *Περι Αἱρέσεων*, referred to in Latin as 'De sectis'. Cf. *Lat Lev*., 346 (OL III 540).

[309] =eventually.

[310] H also expresses mild sympathy with Plato at *Lev*., 369; *Lat. Lev*., 315 (OL III 491); *Six lessons*, 60 (EW VII 346).

Aristotle, or any other Philosopher) they were to be Instructed. Now you cannot doubt but that among so many Heathens, converted in the time of the Apostles, there were Men of all Professions, and Dispositions, and some that had never thought of Philosophy at all, but were intent upon their Fortunes, or their Pleasures; and some that had a greater, some a lesser use of Reason; and some that had studied Philosophy, but professed it not, which were commonly the Men of the better Rank; and some had Professed it only for their better Sustenance[a], and had it not [130] farther, than readily to talk and wrangle; and some were Christians in good earnest, and others but Counterfeit, intending to make use of the Charity of those that were sincere Christians, which in those times was very great. Tell me now of these sorts of Christians which was the most likely to afford the fittest Men to propagate the Faith by Preaching, and Writing, or Publick or private Disputation; that is to say, who were fittest to be made Presbyters and Bishops?

La. Certainly those who (*caeteris paribus*) could make the best use of *Aristotle*'s Rhetorick, and Logick.

Ph. And who were the most prone to Innovation?

La. They that were most confident of *Aristotle*'s, and *Plato*'s (their former Masters) Natural Philosophy: For they would be the aptest to wrest the Writings of the Apostles, and all Scriptures to the Doctrine in which their Reputation was engag'd.

Ph. And from such Bishops and Priests, and other Sectaries it was, that Heresie, amongst the Christians, first came to be a Reproach: For no sooner had one of them Preached, or Published any Doctrine that displeased, either the most, or the most Leading Men of the rest, but it became such a Quarrel as not to be decided, but by a [131] Council of the Bishops in the Province where they Lived; wherein he that would not submit to the General Decree, was called an Heretick, as one that would not relinquish the Philosophy of his Sect; the rest of the Council gave themselves the name of Catholicks, and to their Church, the name of Catholick Church. And thus came up the opposite Terms of Catholick and Heretick.[311]

[a] Abstinence H elsewhere distinguished the founders of the schools and their more reputable followers from 'ignorant men, and very often needy Knaves', who 'made use thereof to get their Living' (*Hist. Narr*., 136: EW IV 387).

[311] *Lat. Lev*., 316 (OL III 492); *Hist. Narr*., 139 (EW IV 390).

La. I understand how it came to be a Reproach, but not how it follows that every Opinion condemned by a Church that is, or calls it self Catholick, must needs be an Error, or a Sin. The Church of *England* denies that Consequence, and that Doctrine as they hold cannot be proved to be Erroneous, but by the Scripture, which cannot Err; but the Church, being but men, may both Err, and Sin.

Ph. In this Case we must consider also that Error, in it's own Nature, is no Sin: For it is Impossible for a Man to Err on purpose, he cannot have an Intention to Err; and nothing is Sin, unless there be a sinful Intention; much less are such Errors Sins, as neither hurt the Common-wealth, nor any private Man, nor are against any Law Positive, or Natural; such Errors as were those for which Men were burnt in the time when the Pope had the Government of this Church. [132]

La. Since you have told me how Heresie came to be a name, tell me also how it came to be a Crime? And what were the Heresies that first were made Crimes?

Ph. Since the Christian Church could declare, and none else, what Doctrine[s] were Heresies, but had no power to make Statutes for the punishment of Hereticks before they had a Christian King; it is manifest that Heresie could not be made a Crime before the first Christian Emperor, which was *Constantine* the Great. In his time one *Arius* a Priest of *Alexandria* in Dispute with his Bishop, Publickly denyed the Divinity of Christ, and Maintained it afterwards in the Pulpit, which was the Cause of a Sedition, and much Blood shed, both of Citizens, and Souldiers in that City. For the preventing of the like for the time to come, the Emperor called a General Council of Bishops to the City of *Nice*,[312] who being met, he exhorted them to agree upon a Confession of the Christian Faith, promising whatsoever they agreed on he would cause to be observed.

La. By the way, the Emperor (I think) was here a little too Indifferent.[313]

Ph. In this Council was Established so much of the Creed we now use, and call the *Nicene* Creed, as reacheth to the words, *I believe*

[312] =Nicaea.

[313] Cf. *Hist. Narr.*, 141 (EW IV 392): '*This may perhaps seem a greater indifferency than would in these dayes be approved of*. But so it is in the History; and the Articles of Faith necessary to Salvation, were not thought then to be so many as afterwards they were defined to be by the Church of *Rome*.'

in the Holy Ghost. The rest was E-[133]stablished by the 3 General Councils next succeeding. By the words of which Creed almost all the Heresies then in being, and especially the Doctrine of *Arius*, were Condemn'd: So that now all Doctrines Published by Writing, or by Word, and repugnant to this Confession of the first four General Councils, and contained in the *Nicene* Creed were, by the Imperial Law forbidding them, made Crimes; such as are that of *Arius* denying the Divinity of Christ; that of *Eutiches* denying the 2 Natures of Christ; that of the *Nestorians* denying the Divinity of the Holy Ghost; that of the *Anthropomorphites*, that of the *Manichees*, that of the *Anabaptists*, and many other.[314]

La. What Punishment had *Arius*?

Ph. At the first for refusing to Subscribe, he was deprived and Banished; but afterwards having satisfied the Emperor concerning his future Obedience (for the Emperor caused this Confession to be made, not for the regard of Truth of Doctrine, but for the preserving of the Peace, especially among his Christian Souldiers, by whose valour he had gotten the Empire, and by the same was to preserve it) he was received again into Grace, but dyed before he could repossess his Benefice. But after the time of those Councils, the Imperial Law made the Punishment for Heresie to be Capital, though [134] the manner of the Death was left to the *Praefects* in their several Jurisdictions; and thus it continued till somewhat after the time of the Emperor *Frederick Barbarossa*,[315] and the Papacy having gotten the upper hand of the Emperor, brought in the use of Burning both Hereticks, and Apostates; and the Popes from time to time made Heresie of many other points of Doctrine, (as they saw it conduce to the setting up of the Chair above the Throne) besides those determined in the *Nicene* Creed, and brought in the use of Burning; and according to this Papal-Law there was an Apostate Burnt at *Oxford* in the time of *William* the Conqueror for turning *Jew*.[316] But of

[314] Cf. *Lat. Lev*., 316, 349 (OL III 492–3, 544); *Hist. Narr*., 139–53 (EW IV 391–401); *Beh*., 16 (EW VI 176).

[315] *Lat. Lev*., 354 (OL III 552) implies a doubt whether heresy (as opposed to apostasy) was a capital crime before Barbarossa.

[316] Actually in 1222. The story is found in Bracton, *De legibus*, 124r (other medieval sources are listed in Maitland, *Roman canon law*, 158–79).

a Heretick Burnt in *England* there is no mention made till after the Statute of 2 *Hen*. 4.[317] Whereby some followers of *Wiclif* (called *Lollards*) were afterwards Burned, and that for such Doctrines, as by the Church of *England*, ever since the first year of Queen *El*. have been approved for Godly Doctrines, and no doubt were Godly then; and so you see how many have been Burnt for Godliness.

La. 'Twas not well done; but 'tis no wonder we read of no Hereticks before the time of *H*. 4. For in the Preamble to that Statute it is intimated, that before those *Lollards* there never was any Heresie in *England*.[318] [135]

Ph. I think so too; for we have been the tamest Nation to the Pope of all the World. But what Statutes concerning Heresie have there been made since?

La. The Statute of 2 *H*. 5. *c*. 7. which adds to the Burning the Forfeiture of Lands, and Goods,[319] and then no more till the 25 H. 8. *c*. 14. which confirms the two former and giveth some new Rules concerning how they shall be Proceeded with. [320]But by the Statute of 1 *Ed*. 6. *cap*. 12. All Acts of Parliament formerly made to punish any manner of Doctrine concerning Religion are repeal'd. For therein it is ordain'd, after divers Acts specified; [321]that all and every other Act, or Acts of Parliament concerning Doctrine, or matters of Religion, and all, and every Branch, Article, Sentence and Matter, Pains and Forfeitures contained, mentioned, or any wise declared in the same Acts of Parliament or Statutes shall be from henceforth Repealed, utterly void, and of none effect. So that in the time of King *Ed*. 6. not only all Punishments of Heresie were taken away, but also the Nature of it was changed, to what Originally it was, a Private Opinion. Again in 1&2[a] *Phil*. and *Ma*. those former Statutes of

[317] The first Lollard martyr, William Sawtre (d.1401), was burned just before this enactment. This passage must post-date *Lat. Lev*., 354–5 (OL III 552), where H admits that from the late twelfth century until the time of Queen Elizabeth 'certum est in Anglia nostra . . . consuetudine quadam in Legem transeunte, Haereticos comburi solitos esse [it is certain that in our England . . . by a certain custom passing over into law, heretics were usually burned]'.

[318] 2 Henry IV c.15 (SR II 125–6).

[319] 2 Henry V st.1 c.7 (SR II 181–4).

[320] 25 Henry VIII c.14 (SR III 454–5).

[321] Quot. to 'none effect' (1 Edward VI c.12 §2: SR IV 19).

[a] 12

2 *H*. 4. *cap*. 15. 2 *H*. 5. *Cap*. 7[a]. 25. *H*. 8. *cap*. 14. are Revived,[322] and the Branch of 1 *Ed*. 6. *cap*. 12. touching Doctrine (though not specially [136] named) [made useless; the reason it was not repealed][b] seemeth to be this, that the same Statute confirmeth the Statute of 25 *Ed*. 3. concerning Treasons. Lastly, in the first year of Queen *Eliz. cap*. 1. the aforesaid Statutes of Queen *Mary* are taken away, and thereby the Statute of 1 *Ed. cap*. 12. Revived; so as there was no Statute left for the Punishment of Hereticks. But Queen *Eliz*. by the Advice of her Parliament gave a Commission (which was called the High-Commission) to certain Persons (amongst whom were very many of the Bishops) to Declare what should be Heresie for the future; but with a Restraint, that they should Judge nothing to be Heresie, but what had been so declared in the first four General Councils.[323]

Ph. From this which you have shewed me, I think we may proceed to the Examination of the Learned Sir *Edw. Coke* concerning Heresie. In his Chapter of Heresie, 3 *Inst*. p. 40. he himself confesseth, that no Statute against Heresie stood then in Force:[324] when

[a] 17

[322] Mary did indeed revive three heresy laws, but the third was 5 Richard II st. 2c.5, not 25 HVIII c.14. H made the same error in *Hist. Narr*., 157 (EW IV 405); he avoided it, however, in the Chatsworth MS on heresy (Mintz, 'Hobbes on heresy', 413), no doubt because the latter sets out to summarize the statute book.

[b] The missing words contain two elements. First, something presumably happened to 1 Edward VI to balance the 'revival' of the Catholic heresy laws. *Ph*. insists in the next speech that 'from Acts Repealed . . . there can be gathered nothing', but also that 1 Edward VI c.12 was still 'in force' during Elizabeth's reign. It follows that the statute cannot have been 'repealed' by Philip and Mary, though it was manifestly ineffective in the period of the Marian persecution. *Hist. Narr*., 157 (EW IV 405) notes that 'this Act of 1 *Ed*. 6. was not repealed, but made useless, by reviving the statute of 25 *Hen*. 8. and freely put[ting] it in execution; insomuch as it was Debated, Whether or no they should proceed upon that Statute against the Lady *Elizabeth*, the Queens Sister.' The Chatsworth MS has the same interpretation (Mintz, 'Hobbes on heresy', 413–14). Secondly, something has been said that is explained by the consideration that 'the same statute confirmeth' the medieval treason law. It must be admitted, however, that the argument imputed here is not entirely cogent. The previous branch of chapter 12 had indeed restored the treason law of 25 Edward III (this was an explicitly liberalizing measure after Henry VIII's oppressive legislation) and H could plausibly assume that the reform of treason and heresy law were seen as two parts of a single political programme; there was no *legal* obstacle, however, to altering the one without the other.

[323] I Eliz. c.1 §20 (SR IV 354). Heresies declared in Scripture could also be punished. See above pp. 27–9.

[324] *Third Inst*., 40.

in the 9th year of King *James, Bartholomew Legat* was Burnt for *Arianism*, and that from the Authority of the Act of 2 *Hen*. 4. *cap*. 15. and other Acts cited in the Margin, it may be gather'd, that the Diocesan hath the Jurisdiction of Heresie. This I say is not true: For as to Acts of Parliament it is manifest, that from Acts Repea-[137]led; that is to say, from things that have no being, there can be gathered nothing. And as to the other Authorities in the Margin, *Fitzherbert*, and the Doctor and Student, they say no more than what was Law in the time when they writ;[325] that is, when the Popes Usurped Authority was here obeyed: But if they had Written this in the time of King *Ed*. 6. or Queen *Elizabeth*, Sir *Edw. Coke* might as well have cited his own Authority, as theirs; for their Opinions had no more the force of Laws than his. Then he cites this Precedent of *Legat*, and another of *Hammond* in the time of Queen *Elizabeth*; but Precedents prove only what was done, and not what was well done. What Jurisdiction could the Diocesan then have of Heresie, when by the Statute of *Ed*. 6. *cap*. 12. then in force, there was no Heresie, and all Punishment for Opinions forbidden: For Heresie is a Doctrine contrary to the Determination of the Church, but then the Church had not Determined any thing at all concerning Heresie.

La. But seeing the High Commissioners had Power to Correct, and Amend Heresies, they must have Power to cite such as were Accused of Heresie, to appear before them, or else they could not execute their Commission. [138]

Ph. If they had first made, and published a Declaration of what Articles they made Heresie, that when one Man heard another speak against their Declaration, he might thereof inform the Commissioners, then indeed they had had Power to cite, and imprison the Person accus'd; but before they had known what should be Heresie; how was it possible that one Man should accuse another? And before he be accused, how can he be cited?

La. Perhaps it was taken for granted, that whatsoever was contrary to any of the 4 first General Councils, was to be judged Heresie.

Ph. That granted, yet I see not how one Man might accuse another e'er[a] the better for those Councils. For not one Man of ten

[325] Fitzherbert, *Novel Natura Brevium*, 269b; St German, *Dr and Student*, 242–3.

[a] 'ere

thousand had ever read them, nor were they ever published in *English*, that a Man might avoid Offending against them, nor perhaps are they extant; nor if those that we have Printed in *Latin* are the very Acts of the Councils (which is yet much disputed amongst Divines)[326] do I think it fit they were put in the Vulgar Tongues. But it is not likely that the makers of the Statutes had any purpose to make Heresie of whatsoever was repugnant to those 4 General Councils: For if they had, I believe the Anabaptists, of which there was great plen-[139]ty in those times, would one time or other have been question'd upon this Article of the Nicene Creed, *I believe one Baptism for the Remission of sins*;[327] nor was the Commission it self for a long time after Registred, that Men might in such uncertainty take heed and abstain (for their better safety) from speaking of Religion any thing at all.[328] But by what Law was this Heretick *Legat* burnt? I grant he was an *Arian*, and his Heresie contrary to the Determination of the Church of *England*, in the Highest Points of Christianity; but seeing there was no Statute-Law to burn him, and the[a] Penalty forbidden, by what Law, by what Authority was he burn't?

La. That this *Legat* was accused of Heresie, was no fault of the High Commissioners, but when he was accused, it had been a fault in them not to have examin'd him, or having examin'd him, and found him an *Arian*, not to have judged him so, or not to have certified him so. All this they did, and this was that all that belonged unto them; they medled not with his Burning, but left him to the Secular Power to do with him what they pleased.[329]

Ph. Your Justification of the Commissioners is nothing to the Question; the Question is by what Law he was burn't, the Spiritual-Law gives no Sentence of Tem-[140]poral Punishment, and Sir

[326] Notably by the Huguenot Jean Daillé, *Traicté de l'employ des saincts Pères* (Geneva, 1632), translated into English as John Daille, *A Treatise concerning the right use of the Fathers* (1651). H seems to be referring primarily to those 'who deny the Councils are extant, having been corrupted by the Arians, and for that reason suppressed by the Catholics' [qui extare illa negant, ut ab Arrianis corrupta, et ob eam causam suppressa a Catholicis] (*Lat. Lev*., 356; OL III 555).

[327] Two Dutch Anabaptists were burned at Smithfield in 1575 (Fuller, *Church-History*, Book IX, 104–5; Stow, *Annals*, 1151).

[328] *Fourth Inst*., 326. Cf. *Lat. Lev*., 357 (OL III 555–6).

[a] no

[329] In fact, Legate was tried by a diocesan court (for details, see above, p. xlviii).

Edw. Coke confesseth that, he could not be burned, and Burning forbidden by Statute-Law. By what Law then was he burned?

La. By the Common-Law.

Ph. What's that? It is not Custom; for before the time of *Henry* the 4th, there was no such Custom in *England*; for if there had [been], yet those Laws that came after were but Confirmations of the Customs, and therefore the Repealing of those Laws was a Repealing of the Custom. For when King *Ed*. the 6th, and Queen *Eliz*. abolished those Statutes, they abolished all Pains, and consequently, Burning, or else they had abolished nothing. And if you will say he was burn't by the Law of Reason, you must tell me how there can be Proportion between Doctrine and Burning; there can be no Equality, nor Majority, nor Minority Assigned between them. The Proportion that is between them, is the Proportion of the Mischief which the Doctrine maketh, to the Mischief to be Inflicted on the Doctor;[330] and this is to be measur'd only by him that hath the charge of Governing the People, and consequently, the Punishing of Offences can be determined by none but by the King, and that, if it extend to life or member, with the Assent of Parliament.[331] [141]

La. He does not draw any Argument for it from Reason, but alledgeth for it this Judgment executed upon *Legat*, and a story out of *Hollingshed*, and *Stow*:[332] But I know that neither History, nor Precedent will pass with you for Law. And though there be a Writ *de haeretico comburendo* in the Register (as you may Read in *Fitzherbert*)[333] grounded upon the Statutes of 2 *H*. 4. *cap*. 15. and

[330] If this implies that punishment should be retributive, it marks an important departure; his earlier works are unequivocal that deterrence is the only legitimate motive for the infliction of a penalty (*El*., I xvi 10; *De C*., iii 11 27n.; *Lev*., 76, 161–2).

[331] According to *De C*., xiv 8, punishments should be settled by the sovereign; perhaps through inadvertence, H did not clearly state this at *Lev*., 152–3, 163. The concession of a parliamentary veto on corporal punishments is a startling qualification of royal sovereignty, unparallelled in H's earlier writings.

[332] *Third Inst*., 40 cites Stow, *Annals*, 1161 and Holinshed, *Chronicles*, III 1299, both describing the execution of Matthew Hamont, a heretic burned at Norwich in 1579 for heresies including the denial of the divinity of Christ. H probably did not consult these works, which mention other burnings in their text and in the index under 'heresy'.

[333] Fitzherbert, *Novel Natura Brevium*, 269b–70a.

2. *H.* 5. *cap.* 7. yet seeing those Statutes are void, you will say the Writ is also void.[334]

Ph. Yes indeed will I. Besides this, I understand not how that is true that he saith; that the Diocesan hath Jurisdiction of Heresie, and that so it was put in ure[335] in all Queen *Elizabeths* reign; whereas by the Statute it is manifest, that all Jurisdiction spiritual, was given under the Queen, to the High Commissioners, how then could any one Diocesan have any part thereof without deputation from them, which by their Letters Patents they could not grant, nor was it reasonable they should: For the Trust was not committed to the Bishops only, but also to divers Lay-Persons, who might have an Eye upon their Proceedings, lest they should Incroach upon the power Temporal. But at this day there is neither Statute, nor any Law to Punish Doctrine, but the ordinary Power Ecclesiastical, and that [142] according to the Canons of the Church of *England*, only Authorized by the King, the High Commission being long since abolished.[336] Therefore let us come now to such Causes Criminal, as are not Capital.

Of Praemunire.

La. The greatest Offence not Capital is that which is done against the Statute of Provisors[a].

Ph. You have need to expound this.

La. This Crime is not unlike to that for which a Man is outlawed, when he will not come in and submit himself to the Law; saving that in Outlawries there is a long Process to precede it; and he that is outlawed, is put out of the Protection of the Law. But for the Offence against the Statute of Provisors (which is called *Praemunire facias* from the words in the Original Writ) if the Offender submit not himself to the Law within the space of 2 Months after notice, he is presently[337] an Outlaw: And

[334] Fitzherbert's view is just the opposite. *De heretico comburendo* is treated as a common law procedure abolished by 2 Henry IV c.15 and revived by 25 Henry VIII c.14.

[335] =put into practice.

[336] High Commission was abolished by 16 Car. I c.11 (SR V 112–13), which also declared the erection of similar courts illegal. 13 Car. II st.1 c.12 affirmed the basic principle, but safeguarded 'the ordinary course of Justice in Causes Ecclesiasticall' (SR V 315).

[a] Provisoes

[337] =immediately.

this Punishment (if not Capital) is equivalent to Capital: For he lives secretly at the Mercy of those that know where he is, and cannot without the like Peril to themselves, but discover him. And it has been much disputed before the time of Queen *Elizabeth*, whether he might not be lawful-[143]ly killed by any Man that would, as one might kill a Wolf:[338] It is like the Punishment amongst the old *Romans* of being barred the use of Fire and Water, and like the great Excommunication in the Papacy, when a Man might not eat, or drink with the Offender without incurring the like Penalty.

Ph. Certainly the Offence for which this Punishment was first Ordained, was some abominable Crime, or of extraordinary Mischief.

La. So it was: For the Pope, you know, from long before the Conquest, incroached every day upon the Power Temporal. Whatsoever could be made to seem to be *in ordine ad Spirituallia*[339] was in every Common-wealth[a] claimed, and haled to the Jurisdiction of the *Pope*: And for that end in every Country he had his Court Ecclesiastical, and there was scarce any cause Temporal, which he could not, by one shift or other, hook into his Jurisdiction, in such sort as to have it tryed in his own Courts at *Rome*, or in *France*, or in *England* it self. By which means the Kings Laws were not regarded, Judgments given in the Kings Courts were avoided, and presentations to Bishopricks, Abbies, and other Benefices (founded, and endowed by the Kings, and Nobility of *England*) were bestowed by the *Pope* upon [144] strangers, or such (as with Money in their Purses) could travel to *Rome*, to provide themselves of such Benefices. And suitably hereunto, when there was a Question about a Tythe, or a Will, though the point were meerly Temporal, yet the Popes Court here would fetch them in, or else one of the Parties would appeal to *Rome*. Against these Injuries of the *Roman* Church, and to maintain the Right and Dignity of the Crown of *England*, *Ed*. 3.[b] made a Statute concerning Provisors (that is, such as provide themselves with Benefices here from *Rome*) for in the 25th year

[338] According to Coke, the right to kill an outlaw had been reserved to the sheriff since the time of Edward III (*First Inst*., 128b).

[339] 'In order to spiritual things' (i.e. relevant to spiritual welfare).

[a] Interlinear hyphen.

[b] 1

of his Reign he ordained in a full Parliament that the Right of Election of Bishops, and Right of Advowsans, and Presentations belonged to himself, and to the Nobility that were the founders of such Bishopricks, Abbies, and other Benefices.[340] And he enacted farther, that if any Clerk, which he, or any of his Subjects should present, should be disturbed by any such Provisor that such Provisor, or Disturber should be attached[341] by his Body, and if Convicted, lye in Prison till he were Ransomed at the Kings Will, and had satisfied the Party griev'd, renounced his Title, and found sureties not to sue for it any farther; and that if they could not be found, then Exigents[342] should go forth to Outlawrie, and the Profits of the Benefice in the mean time be taken into the [145] Kings hands.[343] And the same Statute is confirmed in the 27th year of King *Ed.* the 3d, which Statute alloweth to these Provisors six weeks Day to appear, but if they appear before they be outlaw'd, they shall be received to make Answer, but if they render not themselves, they shall forfeit all their Lands, Goods, and Chattels, besides that they stand outlaw'd.[344] The same Law is confirmed again by 16 *Rich.* 2d. *cap.* 5. in which is added (because these Provisors obtained sometimes from the *Pope*, that such *English* Bishops as according to the Law were instituted, and inducted by the Kings Presentees should be excommunicated) that for this also both they, and the Receivers and Publishers of such Papal Process, and the Procurers should have the same Punishment.[345]

Ph. Let me see the Statute it self of 27 *Ed.* 3.

La. It lies there before you set down *verbatim* by Sir *Edw. Coke* himself, both in *English*, and *French*.[346]

Ph. 'Tis well, we are now to consider what it means, and whether it be well, or ill interpreted by Sir *Edw. Coke*. And first it appeareth by the Preamble (which Sir *Edw. Coke* acknowledgeth to be the

[340] 25 Edward III st.4 (SR I 316–18).

[341] =apprehended.

[342] A writ addressed to the sheriff, directing him to summon an offender; the latter suffered outlawry if he did not appear.

[343] 25 Edward III st.4 (SR I 318).

[344] 27 Edward III st.1 c.1 (SR I 329) in fact speaks of 'a Day containing the Space of Two Months'.

[345] 16 Richard II c.5 (SR II 84–6).

[346] *Third Inst.*, 119.

best Interpreter of the Statute)[347] that this Statute was made against the Incroachments only [146] of the Church of *Rome*, upon the Right of the King, and other Patrons to collate Bishopricks and other Benefices within the Realm of *England*, and against the power of the Courts Spiritual, to hold Plea of Controversies determinable in any of the Courts of the King, or to reverse any Judgment there given, as being things that tend to the Disherison of the King, and Destruction of the Common-Law of the Realm always used. Put the case now that a Man had procur'd the *Pope* to reverse a Decree in Chancery, had he been within the danger of Premunire?

La. Yes certainly; or if the Judgment had been given in the Court of the Lord Admiral, or in any other Kings Court whatsoever, either of Law, or Equity; for Courts of Equity are most properly Courts of the Common-Law of *England*, because Equity, and Common-Law (as Sir *Ed. Coke* says) are all one.[348]

Ph. Then the word Common-Law is not in this Preamble restrained to such Courts only where the Tryal is by Juries, but comprehends all the Kings Temporal Courts, if not also the Courts of those Subjects that are Lords of great Mannors.

La. 'Tis very likely, yet I think it will not by every Man be granted. [147]

Ph. The Statute also says; That they who draw Men [349]out of the Realm in Plea, whereof the Cognizance pertaineth to the Kings Court, or of things whereof Judgment is given in the Kings Court, are within the Cases of Premunire. But what if one Man draw another to *Lambeth*[350] in Plea, whereof Judgment is already given at *Westminster*. Is he by this Clause involv'd in a Premunire?

La. Yes: For though it be not out of the Realm, yet it is within the meaning of the Statute, because the *Popes* Court, not the Kings Court, was then perhaps at *Lambeth*.[351]

[347] *First Inst*., 79a; *Fourth Inst*., 330 (referring to 1 Plowden 369: ER LXXV 560).

[348] See above, p. 9.

[349] Quot. to 'Kings Court' (*Third Inst*., 119).

[350] The Archbishop of Canterbury's prerogative court sat at Lambeth, across the river Thames from Westminster.

[351] Some civilians would have denied this. Thomas Ridley (?1550–1629) maintained that none of these statutes applied to any court which sat in England (Ridley, *View of civil law*, 111).

Ph. But in Sir *Edw. Coke*'s time the Kings Court was at *Lambeth*, and not the Popes.

La. You know well enough, that the Spiritual-Court has no power to hold Pleas of Common-Law.

Ph. I do so; but I know not for what cause any simple Man that mistakes his right Court, should be out of the Kings Protection, lose his Inheritance, and all his Goods Personal, and Real; and if taken, be kept in Prison all his Life. This Statute cannot be by Sir *Edw. Cokes* Torture made to say it. Besides, such Men are ignorant in what Courts they are to seek their Remedy: And it is a Custom confirmed by perpetual usage, that such ignorant Men should [148] be guided by their Council at Law. It is manifest therefore, that the makers of the Statute intended not to prohibit Men from their suing for their Right, neither in the Chancery, nor in the Admiralty, nor in any other Court, except the Ecclesiastical Courts, which had their Jurisdiction from the Church of *Rome*. Again, where the Statute says, "which do sue in any other Court, or defeat a Judgment in the Kings Court",[352] what is the meaning of another Court? Another Court than what? Is it here meant the Kings-Bench, or Court of Common-Pleas? Does a Premunire lye for every Man that sues in Chancery, for that which might be remedied in the Court of Common-Pleas? Or can a Premunire lye by this Statute against the Lord Chancellor?[353] The Statute lays it only on the Party that sueth, not upon the Judge which holdeth the Plea. Nor could it be laid neither by this Statute, nor by the Statute of 16 *Rich*. 2. upon the Judges, which were then punishable only by the Popes Authority. Seeing then the Party Suing has a just excuse upon the Council of his Lawyer; and the Temporal Judge, and the Lawyer both are out

[352] The statute actually says: 'which do sue in any other Court to defeat or impeach the judgments given in the Kings Court' (*Third Inst*., 119). The next few sentences suggest the misquotation stems from H himself; he omits the idea of a purpose 'to defeat or impeach the judgments'.

[353] In 1616, just before he was dismissed, a famous jurisdictional dispute pitted Coke (then the Chief Justice of King's Bench) against Lord Chancellor Ellesmere (1540–1617). Coke had maintained that it was *praemunire* to try to sue in Chancery after a judgement at the common law; more startlingly, he had alleged that officers of Chancery could commit a *praemunire* as well as litigants who sued before them (Baker, *Legal profession*, 216–21). In 1670 a litigant sought to revive Coke's claims, but Sir Mathew Hale held 'that this case was not within the statute, and so he said it would appear by the petition whereon the statute was founded' (1 Levinz 243: ER LXXXIII 388).

of the Statute, the punishment of the Premunire can light upon no body.

La. But Sir *Edw. Coke* in this same Chapter bringeth two Precedents to prove, that [149] though the Spiritual-Courts in *England* be now the Kings Courts, yet whosoever sueth in them for any thing tryable by the Common-Law, shall fall into a Premunire. One is, that whereas in the 22d of *Hen*. 8. all the Clergy of *England* in a Convocation by publick Instrument acknowledged the King to be Supream Head of the Church of *England*; yet after this, *viz*. 24 of *H*. 8. this Statute was in force.[354]

Ph. Why not? A Convocation of the Clergy could not alter the Right of Supremacie; their Courts were still the *Popes* Courts. The other Precedent in the 25th of *Hen*. 8. of the Bishop of *Norwich*[355] may have the same Answer, for the King was not declared Head of the Church by Act of Parliament, till the 26th year of his Reign.[356] If he had not mistrusted his own Law, he would not have laid hold on so weak a Proof as these Precedents. And as to the Sentence of Premunire upon the Bishop of *Norwich*, neither doth this Statute, nor that other of *R*. 2. warrant it; he was sentenced for threatning to excommunicate a Man which had sued another before the Mayor:[357] But this Statute forbids not that, but forbids the bringing in, or publishing of Excommunications, or other Process from *Rome*, or any other Place. Before the 26 *Hen*. 8. there is no Question, but that for a Suit in the [150] Spiritual Court here in a Temporal Cause, there lay a Premunire; and if perhaps some Judge[a] or other hath since that time Judged otherwise, his Judgment was erroneous.

La. Nay but by the Statute of 16 *Rich*. 2. *cap*. 5. it appeareth to the contrary, as Sir *Edw. Coke* here will shew you. The effect (saith he) of the Statute of *Rich*. 2. is; [358]That if any Pursue, or cause to be Pursued in the Court of *Rome*, or elsewhere any thing which

[354] *Third Inst*., 121.

[355] Ibid.

[356] 26 Henry VIII c.1 (SR III 492).

[357] In fact the bishop threatened the mayor with excommunication after the latter fined a man for suing in the episcopal courts at Norwich rather than the ecclesiastical courts at Thetford (*Third Inst*., 121).

[a] ∼.

[358] Quot. to end of speech (*Third Inst*., 119).

toucheth the King, against him, his Crown, or Regality, or his Realm, they, their Notaries, *&c.* shall be out of the Kings Protection.

Ph. I pray you let me know the very words of the Statutes as they ly.

La. Presently. [359]The words are, *If any Man Purchase, or Pursue, or cause to be Purchased, or Pursued into the Court of* Rome, *or elsewhere, any such Translations, Processes and Sentences of Excommunication, Bulls, Instruments, or any other things whatsoever, which touch the King, against him, his Crown, and his Regality, or his Realm, as is aforesaid*, &c.[360]

Ph. If a Man bring a Plea of Common-Law into the Spiritual Court, which is now the Kings Court, and the Judge of this Spiritual Court hold Plea thereof: By what Construction can you draw it within the [151] compass of the words you have now read?[a] To sue for my Right in the Kings Court, is no pursuing of Translations of Bishopricks made, or procur'd in the Court of *Rome*, or any place else, but only in the Court of the King, nor is this [b] suit against the King, nor his Crown, nor his Regality, nor his Realm, but the contrary. Why then is it a Premunire? No. He that brings in, or setteth out a Writing in any place whatsoever, wherein is contained, that the King hath so given away his Jurisdiction, as that if a Subject be condemned falsly, his Submission to the Kings Judgment is of none effect; or that the King upon no necessity whatsoever can, out of Parliament time raise Money for the defence of the Kingdom,[361] is, in my opinion, much more within the Statute of Provisors, than they which begin suit for a Temporal Matter in a Court Spiritual. But what Argument has he for this Law of his (since the Statute Law fails him) from the Law of Reason.

La. He says [362]they are called [other] Courts, either because they proceed by the Rules of other Laws, as by the Canon, or Civil Law, or by other Tryals than the Common Law

[359] =at once.

[360] 16 Richard II c.4 (SR II 85).

[a] ∼.

[b] < the >

[361] That the King can never plead 'necessity' for taxing without parliament's consent. H's mischievous suggestion is that denying Ship Money was legal (see above, p.15) amounts to *praemunire*.

[362] Quot. to end of speech (*Third Inst.*, 120).

doth Warrant: For the Tryal[a] Warranted by the Law of *England* for matter of Fact, is by verdict of 12 Men before the Judges of the Common Law, in matters pertaining [152] to the Common Law, and not upon Examination of Witnesses, as in the Court of Equity; so that *Alia Curia*[363] is either that which is govern'd *per aliam Legem*,[364] or which draweth the Party *ad aliud Examen*.[365] For if—

Ph. Stop there. Let us consider of this you have read, for the Tryal warranted by the Law of *England*, is by Verdict of 12 Men. What means he here by the Law of *England*? Does it not warrant the Tryals in Chancery, and in the Court of Admiralty by Witnesses?

La. By the Law of *England* he means the Law used in the Kings Bench; that is to say, the Common-Law.

Ph. This is just as if he had said, that these two Courts did warrant their own way of Tryal; but other Courts not so, but were warranted by the King only, the Courts of Common Law were Warrants to themselves: You see that *alia Curia* is this way ill expounded. In the Courts of Common Law all Tryals are by 12 Men, who are Judges of the Fact; and the Fact known and prov'd, the Judges are to pronounce the Law;[366] but in the Spiritual Court, the Admiralty, and in all the Courts of Equity there is but one Judge, both of Fact, and of Law; this is all the difference. If this difference be intended by the Statute by *alia* [153] *Curia*, there would be a Premunire for suing in a Court, being [b] the Kings Court: The Kings Bench, and Court of Common Pleas may also be different kinds of Courts, because the Process is different; but 'tis plain that this Statute doth not distinguish Courts otherwise than into the Courts of the King, and into the Courts of the Forraign States, and Princes. And seeing you stand upon the name of a Jury for the distinguishing of Courts, what difference do you find between the Tryals at the Common-Law,

[a] Tryals

[363] 'Another Court.'

[364] By another Law.

[365] To another Tribunal.

[366] Contrast *Lev*., 146, where juries are treated as judges of law as well as fact.

[b] <not> The sentence as it stands must be corrupt, for nobody would disagree that someone commits *praemunire* by suing in a court 'not being the King's'. H has already stressed that even church courts (since the Reformation) are really royal courts.

and the Tryals in other Courts? You know that in Tryals of Fact naturally, and through all the World the Witnesses are Judges, and it is impossible to be otherwise. What then in *England* can a Jury judge of, except it be of the sufficiency of the Testimony. The Justices have nothing to judge of, nor do, but after the Fact is proved, to declare the Law, which is not Judgment, but Jurisdiction. Again, though the Tryal be in Chancery, or in the Court of Civil Law, 1. The Witnesses are still Judges of the Fact, and he that hath the Commission to hear the Cause hath both the parts; that is to say, of a Jury to judge of the Testimony, and of a Justice to declare the Law. In this, I say, lyes all the difference, which is indeed enough to make a Dispute (as the World goes) about Jurisdiction: [154] But seeing it tends neither to the Disherison of the King, nor of the People, nor to the subversion of the Law of Reason, *i.e.* of Common-Law, nor to the subversion of Justice, nor to any harm of the Realm, without some of which these Statutes are not broken, it cannot be a Premunire.

La. Let me read on. [367]For if the Freehold Inheritances, Goods and Chattels, Debts and Duties, wherein the King and Subject have Right and Property by the Common-Law, should be judged *per aliam Legem*, or be drawn *ad aliud Examen*, the 3 Mischiefs afore exprest, would follow; *viz.* the disherison[a] of the King, and his Crown, the Disherison of his People, and the undoing and destruction of the Common-Law always used.

Ph. That is to say, of the Law of Reason. From hence it follows, that where there are no Juries, and where there are different Laws from ours; that is to say, in all the World besides, neither King, nor People have any Inheritance, nor Goods, nor any Law of Reason. I will examine his Doctrine concerning Cases Criminal no farther. He no where defineth a Crime, that we may know what it is: An odious name sufficeth him to make a Crime of any thing. He hath put Heresie among the most odious Crimes, not knowing what it signifies; and [155] upon no other Cause, but because the Church of *Rome* (to make their usurped Power the more terrible) had made it by long Preaching against it, and Cruelty shown towards many Godly, and learned Men of this, and other Reformed Churches, appear to common People a

[367] Quot. to end of speech (*Third Inst*., 120).

[a] destruction

thing detestable. He puts it in as a Plea of the Crown in the time of Queen *Elizabeth*, whereas in her time there was no Doctrine Heresie; but Justice *Stamford* leaves it out, because when Heresie was a Crime, it was a Plea of the *Mitre*.[368] I see also in this Catalogue of Causes Criminal, he inserteth costly Feeding, costly Apparel, and costly Building, though they were contrary to no Statute.[369] 'Tis true, that by evil Circumstances they become sins; but these sins belong to the Judgment of the Pastors Spiritual. A Justice of the Temporal Law (seeing the Intention only makes them sins) cannot judge whether they be sins or no, unless he have power to take Confessions. Also he makes flattery of the King to be a Crime.[370] How could he know when one Man had flattered another? He meant therefore that it was a Crime to please the King: And accordingly he citeth divers Calamities of such as had been in times past in great favour of the Kings they serv'd; as the Favourites of *Hen*. 3. *Ed*. 2. *Rich*. 2. *Hen*. 6. which Favourites were some [156] imprisoned, some banished, and some put to death by the same Rebels that imprisoned, banished, and put to death the same King, upon no better ground than the Earl of *Strafford*, the Arch-Bishop of *Canterbury*, and King *Charles* the first by the Rebels of that time.[371] *Empson*, and *Dudley* were no Favourites of *Hen*. the 7th, but Spunges, which King *Hen*. the 8th did well squeeze.[372] Cardinal *Woolsey* was indeed for divers years a favourite of *Hen*. the 8th, but fell into disgrace, not for flattering the King, but for not flattering him in the business of Divorce from Queen *Katharine*. You see his Reasoning here, see also his Passion in the Words following. [373]We will for

[368] As opposed to a Plea of the Crown. Sir William Staunford (1509–58) published *Les Plees del Coron* in 1557, in the reign of the Catholic Mary.

[369] *Third Inst*., 199–205.

[370] Ibid., 207–9.

[371] The rebels against Henry III made no attempt to kill him. Thomas Wentworth, Earl of Strafford, William Laud, Archbishop of Canterbury, and their master Charles I were executed in 1641, 1645, and 1649 respectively. The people who killed Strafford were not in a conventional sense rebels; he was done to death, in time of peace, by authority of a statute to which the King reluctantly assented.

[372] Sir Richard Empson (d.1510) and Edmund Dudley (*c*.1462–1510), who implemented Henry VII's unpopular exactions, were executed by Henry VIII on a trumped-up charge of treason.

[373] Quot. to '*perhorrescant*' (*Third Inst*., 208).

some Causes descend no lower, *Qui eorum vestigiis insistunt, eorum exitus perhorrescant*,[374] this is put in for the Favourite (that then was) of King *James*.[375] But let us give over this, and speak of the legal Punishments to these Crimes belonging.

De castigos
Of Punishments.

And in the first place I desire to know who it is that hath the power, for an Offence committed to define, and appoint the special manner of Punishment; for [I] suppose you are not of the Opinion of the *Stoicks* in old time, that all faults are equal, and [157] that there ought to be the same Punishment for killing a Man, and for killing a Hen.[376]

La. The manner of Punishment in all Crimes whatsoever is to be determined by the Common-Law. That is to say, if it be a Statute that determins it, then the Judgment must be according to the Statute; if it be not specified by the Statute, then the Custome in such Cases is to be followed: But if the Case be new, I know not why the Judge may not determine it according to Reason.

Ph. But according to whose reason? If you mean the natural Reason of this, or that Judge authorized by the King to have cognisance of the Cause, there being as many several Reasons, as there are several Men, the punishment of all Crimes will be uncertain, and none of them ever grow up to make a Custome. Therefore a Punishment certain can never be assigned, if it have its beginning from the natural Reasons of deputed Judges, no, nor from the natural of the Supream Judge: For if the Law of Reason did determine Punishments, then for the same Offences there should be through all the World, and in all times the same

[374] 'Let those who follow in their foot-steps tremble at their ends.'

[375] George Villiers, Duke of Buckingham (1592–1628) was favourite of James I from about 1616 till James's death in 1625; he continued to be dominant at court till his assassination in 1628.

[376] The opinion that all faults are equal can be found in Plutarch, *Moralia*, XIII 455; Diogenes Laertius, *Lives*, II 231; Cicero, *Paradoxa Stoicorum*, 271. For the same point, with the example of killing a hen, cf. *Lev*., 156. Neither *Lev*. nor the ancient sources draw the inference that punishments should be equal (I am grateful to Prof. David Sedley for his advice on this).

Punishments; because the Law of Reason is Immutable and Eternal.

La. If the natural Reason neither of the King, nor of any else be able to prescribe a [158] Punishment, how can there be any lawful Punishment at all?

Ph. Why not? For I think that in this very difference between the rational Faculties of particular Men, lyeth the true and perfect reason that maketh every Punishment certain. For, but give the authority of defining Punishments to any Man whatsoever, and let that Man define them, and right Reason has defin'd them. Suppose the Definition be both made, and made known before the Offence committed: For such authority is to trump in Card-playing, save that in matter of Government, when nothing else is turn'd up, Clubs[377] are Trump. Therefore seeing every Man knoweth by his own Reason what Actions are against the Law of Reason, and knoweth what Punishments are by this authority for every evil action ordained; it is manifest Reason, that for breaking the known Laws, he should suffer the known Punishments.[378] Now the Person to whom this authority of defining Punishments is given, can be no other in any place of the World, but the same Person that hath the Soveraign Power, be it one Man, or one assembly of Men:[379] For it were in vain to give it to any Person that had not the power of the Militia to cause it to be executed; for no less power can do it, when many Offenders be united [159] and combin'd to defend one another. There was a Case put to King *David* by *Nathan*, of a rich Man that had many Sheep, and of a poor Man that had but one, which was a tame Lamb: The rich Man had a stranger in his House, for whose entertainment (to spare his own Sheep) he took away the poor Mans Lamb. Upon this Case the King gave Judgment, surely the Man

[377] A pun: 'club-law'='The use of the club to enforce obedience; or physical force, as contrasted with argument' (OED 1).

[378] Cf. *De C*., xiii 16; *Lev*., 152–3.

[379] In the sense H sometimes uses, a 'person' may be singular or plural, because it means a 'representative': '*Persona* in latine signifies the *disguise*, or *outward appearance* of a man, counterfeited on the Stage . . . to *Personate*, is to *Act*, or *Represent* himselfe, or an other; and he that acteth another, is said to bear his Person, or act in his name' (*Lev*., 80; cf. *De H*., xv 1–3).

that hath done this shall die.[380] What think you of this? Was it a Royal, or Tyrannical Judgment?

La. I will not contradict the Canons of the Church of *England*, which acknowledgeth the King of *England*, within his own Dominions hath the same Rights, which the good Kings of *Israel* had in theirs,[381] nor deny King *David* to have been one of those good Kings: But to punish with death without a precedent Law,[382] will seem but a harsh proceeding with us, who unwillingly hear of Arbitrary Laws, much less of Arbitrary Punishments,[383] unless we were sure that all our Kings would be as good as *David*.[384] I will only ask you by what Authority the Clergy may take upon them to determine, or make a Canon concerning the power of their own King, or to distinguish between the Right of a good, and an evil King.

Ph. It is not the Clergy that maketh their Canons to be Law, but it is the King that doth it by the Great Seal of *England*;[385] and [160] it is the King that giveth them power to teach their Doctrines, in that, that he authoriseth them publickly to teach and preach the Doctrine of Christ and his Apostles, according to the Scriptures, wherein this Doctrine is perspicuously contained. But if they had derogated from the Royal Power in any of their Doctrines published, then certainly they had been to[a] blame; nay, I believe that had been more within the Statute of Premunire of 16 *Rich*. 2. *c*. 5. than any Judge of a Court of Equity for holding Pleas of Common Law. I cite not this Precedent of King *David*, as approving the breach of the great Charter, or justifying the

[380] II Samuel xii 1–5.

[381] Canon 2 of 1604 (Bray, *Anglican Canons*, 265–6). Cf. *Answer to Bramhall*, 81 (EW IV 345).

[382] Mosaic law (*Exodus* xxii 1) demanded only fourfold restitution, a punishment discussed on p.33. Note that the 'precedent law' here is not a law forbidding the offence (sheep-stealing has always been known to be illegal), but one determining the punishment.

[383] Contrast *Lev*., 152–3: 'Punishment is a known consequence of the violation of the Lawes, in every Common-wealth; which punishment, if it be determined already by the Law, he is subject to that; if not, then is he subject to Arbitrary punishment.' The point is repeated at ibid., 163.

[384] Cropsey suspects irony here; Nathan had put this question to the king as a prelude to denouncing him for murdering Uriah the Hittite.

[385] This was unarguably true of canons made after the Reformation; on the surviving canons of the medieval church, see p.20 n. 57 above.

[a] too

Punishment with loss of Life, or Member of every Man that shall offend the King; but to shew you that before the Charter was granted, in all Cases where the Punishments were not prescribed, it was the King only that could prescribe them; and that no deputed Judge could punish an Offender, but by force of some Statute, or by the words of some Commission, and not *ex officio*. They might for a contempt of their Courts, because it is a contempt of the King, imprison a Man, during the Kings pleasure, or fine him to the King, according to the greatness of the Offence: But all this amounteth to no more, than to leave him to the Kings Judgment. As for cutting off of Ears, [161] and for the Pillory, and the like corporal Punishments usually inflicted heretofore in the Star-Chamber, they were warranted by the Statute of *Hen*. 7. that giveth them power to punish sometimes by discretion.[386] And generally it is a rule of Reason, that every Judge of Crimes, in case the positive Law appoint no Punishment, and he have no other Command from the King; then to consult the King before he pronounce Sentence of any irreparable dammage on the Offender: For otherwise he doth not pronounce the Law, which is his Office to do, but makes the Law, which is the Office of the King. And from this you may collect, that the Custome of punishing such and such a Crime, in such and such a manner, hath not the force of Law in it self, but from an assured presumption, that the Original of the Custome was the Judgment of some former King.[387] And for this Cause the Judges ought not to run up for the Customs by which they are warranted to the time of the *Saxon* Kings, nor to the time of the Conquest: For the most immediate, antecedent precedents are the fairest warrants of their Judgments, as the most recent Laws have commonly the greatest vigor, as being fresh in the memory of all Men, and tacitly confirm'd (because not disapprov'd) by the Soveraign Legislator. What can be said against[a] this? [162]

La. Sir *Edw. Coke* 3 *Inst*. p. 210. in the Chapter of Judgments and Executions saith, that of Judgments [388]some are by the Common-Law, some by Statute-Law, and some by Custome; wherein he

[386] 11 Henry VII c.7 §3 (SR II 574).

[387] See above, p.102.

[a] a-aginst Interlinear hyphen.

[388] Quot. to 'Custome' (*Third Inst*., 210).

distinguisheth Common-Law, both from Statute-Law and from Custome.

Ph. But you know, that in other places he makes the Common-Law, and the Law of Reason to be all one, as indeed they are, when by it is meant the Kings Reason; and then his meaning in this distinction must be, that there be Judgments by Reason without Statute-Law, and Judgments neither by Statute-Law, nor by Reason, but by Custome without Reason; for if a Custome be Reasonable, then, both he, and other Learned Lawyers say, it is Common-Law; and if unreasonable, no Law at all.

La. I believe Sir *Edw. Coke*'s meaning was no other than yours in this point, but that he inserted the word Custom, because there be not many that can distinguish between Customs reasonable and unreasonable.

Ph. But Custom, so far forth as it hath the force of a Law, hath more of the nature of a Statute, than of the Law of Reason, especially where the question is not of Lands, and Goods, but of Punishments, which are to be defined only by authority. Now to come to particulars: What Pu-[163]nishment is due by Law for High Treason?

La. To be drawn upon a Hurdle from the Prison to the Gallows, and there to be hanged by the Neck, and laid upon the ground alive, and have his Bowels taken out, and burnt, while he is yet living; to have his Head cut off, his Body to be divided into four parts, and his Head, and Quarters to be placed as the King shall assign.

Ph. Seeing a Judge ought to give Judgment according to the Law, and that this Judgment is not appointed by any Statute, how does Sir *Edw. Coke* warrant it by Reason, or how by Custom?

La. Only thus,[389]Reason it is, that his Body, Lands, Goods, Posterity, *&c*. should be torn, pulled asunder, and destroy'd, that intended to destroy the Majesty of Government.

Ph. See how he avoids the saying the Majesty of the King. But does not this Reason make as much for punishing a Traytor as *Metius Fuffetius*[a], in old time, was executed by *Tullus Hostilius* King of *Rome*,[390] or as *Ravillac*, not many years ago in *France*, who were

[389] Quot. to end of speech (ibid., 211).

[a] *Suffetius*

[390] Mettus or Mettius Fuffetius (in fact a treacherous ally, not a traitor) was torn between two chariots. According to Livy, this was the only example of Romans using savage punishments (*Livy*, 102–4).

torn in pieces by four Horses, as it does for Drawing, Hanging, and Quartering?[391]

La. I think it does. But he confirms it also in the same Chapter, by holy Scripture. [164] Thus *Joab* for Treason, 1 *Kings* 2. 28. was drawn from the horns of the Altar; that's proof for drawing upon a Hurdle. *Esth*. 2. 22. *Bithan* for Treason was Hang'd; there's for hanging. *Acts* 1. 18. *Judas* hanged himself, and his Bowels were poured out; there's for hanging, and embowelling alive. 2 *Sam*. 18. 14. *Joab* pierced *Absalom*'s heart; that's proof for pulling out a Traytors heart. 2 *Sam*. 20. 22. *Sheba* the Son of *Bichri* had his Head cut off; which is proof that a Traytors Head ought to be cut off. 2 *Sam*. 4. 12. They slew *Baanah* and *Rechab*, and hung up their Heads over the Pool of *Hebron*; this is for setting up of Quarters. And Lastly for forfeiture of Lands, and Goods, *Psal*. 109. *v*. 9. 10. *&c*. "Let their Children be driven out, and beg, and other Men make spoil of their labours, and let their Memory be blotted out of the Land."[392]

Ph. Learnedly said; and no Record is to be kept of the Judgment.[393] Also the Punishments divided between those Traytors must be joyn'd in one Judgment for a Traytor here.

La. He meant none of this, but intended (his Hand being in) to shew his Reading, or his Chaplains in the Bible.

Ph. Seeing then for the specifying of the Punishment in Case of Treason, he brings no argument from natural Reason; that is [165] to say, from the Common Law; and that it is manifest that it is not the general Custom of the Land, the same being rarely, or never executed upon any Peer of the Realm, and that the King may remit the whole Penalty, if he will; it follows, that the specifying of the Punishment depends meerly upon the authority of the King. But this is certain, that no Judge ought to give

[391] Jean Ravaillac assassinated Henri IV of France in 1610; his elaborate punishment climaxed when he was torn apart by four wild horses. In 1668, H wrote that 'the Traytor loseth the priviledg of being punisht by a praecedent Law; and therefore may be punish'd at the Kings will, as *Ravillac* was for murdering *Henry* the 4th. of *France*' (*Answer to Bramhall*, 16: EW IV 294).

[392] Coke gives this in Latin: 'Mutantes transferuntur filii eius, et mendicent, et ejiciantur de habitationibus suis, et diripient alieni labores eius, et dispereat de terra memoria eius' (*Third Inst*., 211).

[393] The logical implication of Coke's respect for scripture: if *Psalm* cix enjoins the forfeiture of traitors' goods, it also enjoins that 'their memory be blotted out of the land'.

other Judgment, than has been usually given, and approv'd either by a Statute, or by Consent express or implyed, of the Soveraign Power; for otherwise it is not the Judgment of the Law, but of a Man subject to the Law.

La. In Petit Treason the Judgment is, to be drawn to the place of execution, and hang'd by the Neck, or if it be a Woman, to be drawn and burnt.

Ph. Can you imagine that this so nice a distinction can have any other foundation than the wit of a private Man?

La. Sir *Edw. Coke* upon this place says, that she ought not to be beheaded, or hanged.[394]

Ph. No, not by the Judge, who ought to give no other Judgment than the Statute, or the King appoints, nor the Sheriff to make other execution than the Judge pronounceth; unless he have a special warrant from the King. And this I should have thought he had meant, had he not said before, that [166] the King had given away all his Right of Judicature to his Courts of Justice.[395]

La. The Judgment for Felony is—[396]

Ph. Heresie is before Felony in the Catalogue of the Pleas of the Crown.

La. He has omitted the Judgment against a Heretick, because (I think) no Jury [can find][a] Heresie, nor no Judge Temporal did ever pronounce Judgment upon it: For the Statute of 2 *H*. 5. *c*. 7. was, that the Bishop having convicted any Man of Heresie, should deliver him to the Sheriff, and that the Sheriff should believe the Bishop. The Sheriff therefore was bound by the Statute of 2 *H*. 4. after he was delivered to him, to burn him; but that Statute being repeal'd, the Sheriff could not burn him, without a Writ *de Heretico comburendo*, and therefore the Sheriff burnt *Legat* 9. King *James* by that Writ, which was granted by the Judges of the Common-Law at that time, and in that Writ the Judgment is expressed.

Ph. This is strange reasoning; when Sir *Edw. Coke* knew, and confessed, that the Statutes upon which the Writ *de Heretico comburendo* was grounded, were all repeal'd, how could he think

[394] *Third Inst*., 211.

[395] *Fourth Inst*., 70.

[396] Cf. the abrupt transition at p. 91 above.

[a] confin'd An error (as Cropsey points out) that evidently arose during dictation.

the Writ it self could be in force? Or that the Statute which repealeth the Statutes for burning Hereticks was not made with an intent to forbid such [167] burning? It is manifest he understood not his Books of Common-Law: For in the time of *Hen*. 4. and *Hen*. 5. the word of the Bishop was the Sheriff's warrant, and there was need of no such Writ; nor could he till the 25 *Hen*. 8. when those Statutes were repeal'd, and a Writ made for that purpose, and put into the Register, which Writ *Fitzherbert* cites in the end of his *natura brevium*.[397] Again, in the later end of the Reign of Queen *Elizabeth* was published a correct Register of Original and Judicial Writs, and the Writ *de Haeretico comburendo* left out, because that Statute of 25 *H*. 8. and all Statutes against Hereticks were repeal'd, and burning forbidden.[398] And whereas he citeth for the granting of this Writ, 9. *Jac*. the Lord Chief Justice, the Lord Chief Baron, and two Justices of the Common-Pleas, it is, as to all, but the Lord Chief against the Law; for neither the Judges of Common-Pleas, nor of the Exchequer can hold Pleas of the Crown (without special Commission) and if they cannot hold Plea, they cannot condemn.[399]

La. The Punishment for Felony is, that the Felon be hang'd by the Neck till he be dead. And to prove that it ought to be so, he cites a Sentence (from whence I know not) *Quod non licet Felonem pro Felonia decollare*.[400] [168]

Ph. It is not indeed lawful for the Sheriff of his own Head to do it, or to do otherwise than is commanded in the Judgment, nor for the Judge to give any other Judgment, than according to Statute-Law, or the usage consented to by the King, but this hinders not

[397] 25 HVIII c.14 §6. In fact the writ Fitzherbert cites was the one that was used to burn Sawtre in 1401, before the statute of 2 Henry IV (Fitzherbert, *Novel natura brevium*, 269b–70a).

[398] *Registrum omnium brevium tam originalium, quam judicialium* (1595). The writ is not in fact printed in any edition.

[399] 'The Diocesan hath jurisdiction of Heresy, and so it hath been put in ure in all Queen *Elizabeths* reign: and accordingly it was resolved by *Flemming* Chief Justice, *Tanfield* chief Baron, *Williams*, and *Crook* Justices, *Hil. 9. Ja. R.* in the case of *Legate* the Heretique, and that upon a conviction before the Ordinary of Heresy, the writ of *De haeretico comburendo* doth lie' (*Third Inst*., 39–40). H failed to grasp this was not a courtroom judgment, but an extrajudicial opinion. In any case, Williams and Croke were judges of King's Bench, not Common Pleas.

[400] That it is not permissible to decapitate a felon for felony (ibid., 211).

the King from altering his Law concerning Judgments, if he see good cause.

La. The King may do so, if he please: And Sir *Edw. Coke* tells you how he altered particular Judgments in case of Felony, and sheweth, that Judgment being given upon a Lord in Parliament, that he should be hang'd, he was nevertheless beheaded; and that another Lord had the like Judgment for another Felony, and was not hang'd, but beheaded; and withal he shews you the inconveniency of such proceeding, because (saith he) if hanging might be altered to beheading, by the same reason it might be altered to burning, stoning to Death, *&c.*[401]

Ph. Perhaps there might be inconveniency in it; but 'tis more than I see, or he shews, nor did there happen any inconveniency from the execution he citeth: Besides he granteth, that death being *ultimum supplicium* is a satisfaction to the Law. But what is all this to the purpose, when it belongeth not to consider such inconvenien-[169]cies of Government but to the King and Parliament? Or who from the authority of a deputed Judge can derive a power to censure the actions of a King that hath deputed him?

La. For the death of a Man by misfortune, there is (he saith) no express Judgment, nor for killing a Man in ones own defence; but he saith, that the Law hath in both Cases given judgment, that he that so killeth a Man shall forfeit all his Goods and Chattels, Debts and Duties.[402]

Ph. If we consider what Sir *Edw. Coke* saith, 1 *Inst. Sect*. 745. at the word *Felony*, these Judgments are very favourable: For there he saith, that killing of a Man by *Chance-medley*, or *se defendendo* is *Felony*. His words are; [403]wherefore by the Law at this day, under the word *Felony* in Commissions, *&c.* is included Petit Treason, Murder, Homicide, burning of Houses, Burglary, Robbery, Rape, *&c. Chance-medley*, and *se defendendo*. But if we consider only the intent of him that killeth a Man by misfortune, or in his own defence, the same judgments will be thought both cruel, and sinful Judgments. And how they can be *Felony* at this day cannot be understood, unless there be a Statute to make them so.

[401] Ibid., 211–12.

[402] Ibid., 220.

[403] Quot. to '*se defendendo*' (*First Inst*., 391a). See above, p.82.

For the Statute of 52[a] *H.* 3. *cap.* 25. The words whereof, [404]Murder from henceforth shall not [170] be judged before our Justices, where it is found Misfortune only; but it shall take place in such as are slain by *Felony*, and not otherwise, make it manifest, if they be *Felonies*, they must also be Murders, unless they have been made *Felonies* by some latter Statute.

La. There is no such latter Statute, nor is it today[b] in Commission[s]; nor can a Commission, or any thing but another Statute make a thing *Felony*, that was not so before.

Ph. See what it is for a Man to distinguish *Felony* into several sorts, before he understands the general name of *Felony* what it meaneth; but that a Man, for killing another Man by misfortune only, without any evil purpose, should forfeit all his Goods and Chattels, Debts and Duties, is a very hard Judgment, unless perhaps they were to be given to the Kindred of the Man slain, by way of amends for dammage. But the Law is not that. Is it the Common-Law (which is the Law of Reason) that justifies this Judgment, or the Statute-Law? It cannot be the Law of Reason, if the Case be meer misfortune. If a Man be upon his Apple-tree, to gather his Apples, and by ill fortune fall down, and lighting on the Head of another Man kill him, and by good fortune saves himself; shall he for this [171] mischance be punished with the forfeiture of his Goods to the King? Does the Law of Reason warrant this? He should (you'l say) have look'd to his Feet; that's true, but so should he that was under have look'd up to the Tree. Therefore in this Case the Law of Reason (as I think) dictates, that they ought each of them to bear his own misfortune.

La. In this Case I agree with you.

Ph. But this Case is the true Case of meer misfortune, and a sufficient reprehension of the Opinion of Sir *Edw. Coke*.

La. But what if this had hapned to be done by one that had been stealing Apples upon the Tree of another Man? Then (as Sir *Edw. Coke* says, 3 *Inst.* p.[c] 56.) it had been Murder.[405]

Ph. There is indeed great need of good distinction in a Case of killing by misfortune; but in this Case the unlawfulness of stealing

[a] 25

[404] Quot. to 'otherwise'.

[b] to say

[c] ~,

[405] A deduction from Coke's stress on the significance of felonious intentions.

Apples cannot make it Murder, unless the falling it self be unlawful. It must be a voluntary unlawful Act that causeth the death, or else it is no Murder by the Law of Reason: Now the death of the Man that was under the Tree proceeded not from that, that the Apples were not his that fell, but from the fall. But if a Man shoot with a Bow or a Gun at another Man's Deer, and by misfortune kill a Man, such shooting be-[172]ing both voluntary, and unlawful, and also the immediate Cause of the Mans death, may be drawn perhaps well enough sometimes to Murder by a Judge of the Common-Law.[406] So likewise if a Man shoot an Arrow over a House, and by chance kill a Man in the Street, there is no doubt but by the Law of Reason it is Murder, for though he meant no malice to the Man slain, yet it is manifest, that he cared not whom he slew.[407] In this difficulty of finding out what it is that the Law of Reason dictates, who is it that must decide the Question?

La. In the Case of misfortune, I think it belongs to the Jury; for it is matter of Fact only: But when it is doubtful whether the action from which the misfortune came, were Lawful, or Unlawful, it is to be judged by the Judge.

Ph. But if the unlawfulness of the action (as the stealing of the Apples) did not cause the death of the Man, then the stealing, be it[a] Trespass, or *Felony*, ought to be punished alone, as the Law requireth.

La. But for killing of a Man *se defendendo*, the Jury (as Sir *Edw. Coke* here says) shall not in their Verdict say it was *se defendendo*, but shall declare the manner of the Fact in special, and clear it to the Judge, to consider how it is to be called, whether *se defendendo*, Manslaughter, or Murder.[408] [173]

Ph. One would think so; for it is not often within the capacity of a Jury to distinguish the signification of the different and hard names which are given by Lawyers to the killing of a Man; as Murder and Felony, which neither the Laws, nor the makers of the Laws have yet defined. The Witnesses say, that thus and

[406] *Third Inst*., 56.

[407] Coke's example is: 'If a man knowing that many people come in the street from a Sermon, throw a stone over a wall, intending only to feare them [*sic*], or to give them a light hurt, and thereupon one is killed, this is murder; for he had an ill intent' (ibid., 57).

[a] ∼,

[408] Ibid., 220.

thus the Person did, but not that it was Murder or *Felony*; no more can the Jury say, who ought to say nothing but what they hear from the Witnesses, or from the Prisoner. Nor ought the Judge to ground his Sentence upon any thing else, besides the special matter found, which according as it is contrary, or not contrary to the Statute, ought to be pronounced.

La. But I have told you, that when the Jury has found misfortune, or *se defendendo*, there is no judgment at all to be given, and the Party is to be pardoned of course,[409] saving that he shall forfeit his Goods and Chattells, Debts and Duties to the King.

Ph. But I understand not how there can be a Crime for which there is no Judgment, nor how any Punishment can be inflicted without a precedent Judgment, nor upon what ground the Sheriff can seize the Goods of any Man, till it be judged that they be forfeited. I know that Sir *Edw. Coke* saith,[410] that in the Judgment of hanging, the Judg-[174]ment of forfeiture is implyed, which I understand not; though I understand well enough, that the Sheriff by his Office may seize the Goods of a *Felon* convicted; much less do I conceive how the forfeiture of Goods can be implyed in a no-judgment, nor do I conceive, that when the Jury has found the special manner of the Fact to be such, as is really no other than *se defendendo*, and consequently, no fault at all, why he should have any Punishment at all. Can you shew me any Reason for it?

La. The Reason lies in the Custom.

Ph. You know that unreasonable Customs are not Law, but ought to be abolished; and what Custom is there more unreasonable than that a Man should be punished without a fault?

La. Then see the Statute of 24 *Hen*. 8. *cap*. 5.

Ph. I find here, that at the making of this Statute there was a Question amongst the Lawyers, [411]in case one Man should kill another that attempted feloniously to Rob, or Murder him in, or near any Common High-way, Court-way, Horse-way, or Foot-way, or in his Mansion, Messuage, or Dwelling-place; whether for the death of such a Man one shall forfeit his Goods and Chattells, as a Man should do for killing another by

[409] =as a matter of course, automatically.

[410] *Third Inst*., 212.

[411] P/phrase to 'defence' (24 Henry VIII c.5: SR III 422).

Chance-medley, or in his own de-[175]fence. This is the Preamble, and penned as well as Sir *Edw. Coke* could have wished; but this Statute does not determine that a Man should forfeit his Goods for killing a Man *se defendendo*, or for killing him by misfortune; but supposeth it only upon the opinion of the Lawyers that then were. The body of the Statute is, that if a Man be indicted, or appealed for the death of such Person so attempting as aforesaid, and the same by verdict be so found and tryed, he shall not forfeit any thing, but shall be discharged as if he had been found *not Guilty*.[412] You see the Statute, now consider thereby in the case of killing *se defendendo*. First[a], if a Man kill another in his own defence, it is manifest, that the Man slain did either attempt to Rob, or to Kill, or to Wound him; for else it was not done in his own defence. If then it were done in the Street, or near the Street as in a Tavern, he forfeits nothing because the Street is a High-way. So likewise it is to be said of all other Common-ways. In what place therefore can a Man kill another in his own defence, but that this Statute will discharge him of the forfeiture?

La. But the Statute says the attempt must be felonious.

Ph. When a Man assaults me with a Knife, Sword, Club, or other mortal Wea-[176]pon; does any Law forbid me to defend my self, or command me to stay so long as to know whether he have a felonious intent, or no? Therefore by this Statute, in case it be found *se defendendo*, the forfeiture is discharged, if it be found otherwise, it is Capital. If we read the Statute of *Glocester, cap*. 9. I think it will take away the difficulty: For by that Statute, [413]in case it be found by the Countrey,[414] that he did it in his own defence, or by misfortune, then by the report of the Justices to the King, the King shall take him to his Grace, if it please him. From whence it followeth; first, that it was then thought Law, that the Jury may give the general verdict[415] of *se defendendo*, which Sir *Edw. Coke* denies. Secondly, that the Judge ought to report especial matter to the King. Thirdly, that the King may

[412] An accurate summary.

[a] Frst

[413] Quot. to 'please him' (6 Edward I c.9 SR I 49).

[414] =county (i.e. the jury).

[415] A general verdict decides the point at issue; a special verdict finds the facts and leaves it to a judge to apply the law.

take him to his Grace, if he please, and consequently, that his Goods are not to be seiz'd, till the King (after the report of the Judge heard) give the Sheriff command to do it. Fourthly, that the general verdict of the Jury[a] hinders not the King, but that he may Judge of it upon the special matter, for it often happens that an ill-disposed Person provokes a Man with words, or otherwise on purpose to make him draw his Sword, that he may kill him, and pretend it done in his own defence; which ap-[177]pearing, the King may, without any offence to God, punish him as the cause shall require. Lastly (contrary to the Doctrine of Sir *Edw. Coke*)[416] he may in his own Person be Judge in the case, and annul the Verdict of the Jury, which a deputed Judge cannot do.

La. There be some cases wherein a Man, though by the Jury he be found *not Guilty*, shall nevertheless forfeit his Goods and Chattells to the King. For example; a Man is slain, and one *A*. hating *B*. giveth out that it was *B*. that slew him: *B*. hearing thereof, fearing if he be tryed for it, that through the great power of *A*. and others that seek his hurt, he should be condemned, flieth, and afterwards is taken, and tryed; and upon sufficient evidence is by the Jury found *Not Guilty*; yet because he fled he shall forfeit his Goods and Chattels, notwithstanding there be no such Judgment given by the Judge, nor appointed by any Statute, but the Law it self authoriseth the Sheriff to seize them to the use of the King.

Ph. I see no reason (which is Common-Law)[b] for it, and am sure it is grounded upon no Statute.

La. See Sir *Edw. Coke, Inst*. 1. *Sect*. 709. and read. [178]

Ph. If [417]a Man that is Innocent be accus'd of *Felony*, and for fear flieth for the same; albeit that he be judicially acquitted of the *Felony*, yet if it be found that he fled for the same, he shall (notwithstanding his Innocence) forfeit all his Goods and Chattells, Debts and Duties. O unchristian, and abominable Doctrine! which also he in his own words following contradicteth: [418]For (saith he) as to the forfeiture of them, the Law will admit no proof against the presumption of the Law grounded upon his

[a] King

[416] *Fourth Inst*., 71.

[b] Interlinear hyphen.

[417] Quot. to 'Duties' (*First Inst*., 373a–b). Also quoted in *Lev*., 144.

[418] Quot. to 'Exceptions' (*First Inst*., 373b).

flight, and so it is in many other cases: But that the general Rule is, *Quod stabitur praesumptioni, donec probetur in contrarium*,[419] but you see it hath many exceptions. This general Rule contradicts what he said before; for there can be no exceptions to a general Rule in Law, that is not expresly made an exception by some Statute, and to a general Rule of equity there can be no exception at all.[420] From the power of Punishing, let us proceed to the power of Pardoning.

La. Touching the power of Pardoning, Sir *Edw. Coke* says, 3 *Inst*. p. 236. That no Man shall obtain Charter of pardon out of Parliament, and cites for it the Statute of 2 *Ed*. 3. *cap*. 2. and says farther, that accordingly in a Parliament Roll it is said, that for the peace of the Land it would help, [179] that no pardon were granted but by Parliament.[421]

Ph. What lawful power would he have left to the King, that thus disableth him to practice Mercy? In the Statute which he citeth, to prove that the King ought not to grant Charters of Pardon but in Parliament[,] there are no such words, as any Man may see; for that Statute is in Print; and that which he says is in the Parliament Roll, is but a wish of he tells not whom, and not a Law; and 'tis strange that a private wish should be inroll'd amongst Acts of Parliament. If a Man do you an injury, to whom (think you) belongeth the Right of pardoning it?

La. Doubtless to me alone, if to me alone be done that injury; and to the King alone, if to him alone be done the injury; and to both together, if the injury be done to both.[422]

Ph. What part then has any Man in the granting of a pardon, but the King and the party wrong'd. If you offend no Member of either House, why should you ask their pardon?[a] It is possible that a

[419] 'That the presumption will stand till the contrary be proved.'

[420] *Lev*.'s discussion is clearer: 'A written Law may forbid innocent men to fly, and they may be punished for flying: But that flying for feare of injury, should be taken for presumption of guilt, after a man is already absolved of the crime Judicially, is contrary to the nature of a Presumption, which hath no place after Judgement given . . . If the Law ground upon his flight a Presumption of the fact [=deed], (which was Capitall,) the Sentence ought to have been Capitall: if the Presumption were not of the Fact, for what then ought he to lose his goods? . . . It is also against Law, to say that no Proofe shall be admitted against a Presumption of Law. For all Judges, Soveraign and subordinate, if they refuse to heare Proofe, refuse to do Justice' (*Lev*., 144–5).

[421] *Third Inst*., 236. [422] Cf. *Lev*., 180. [a] ∼.

Man may deserve a pardon; or he may be such a one sometimes as the defence of the Kingdom hath need of; may not the King pardon him, though there be no Parliament then sitting? Sir *Edw. Coke*'s Law is too general in this [180] point, and I believe, if he had thought on't, he would have excepted some Persons, if not all the Kings Children, and his Heir apparent; and yet they are all his Subjects, and subject to the Law as other Men.

La. But if the King shall grant pardons of Murder and Felony, of his own head, there would be very little safety for any Man, either out of his House, or in it, either by Night, or by Day: And for that very cause there have been many good Statutes provided, which forbid the Justices to allow of such pardons as do not specially name the Crime.

Ph. Those Statutes, I confess, are reasonable, and very profitable, which forbid the Judge to pardon Murders, but what Statute is there that forbids the King to do it? There is a Statute of 13 *Rich*. 2. *c*. 1. wherein the King promiseth not to pardon Murder, but there is in it a clause for the saving of the Kings Regality.[423] From which may be inferr'd, that the King did not grant away that power, when he thought good to use it for the Common-wealth. Such Statutes are not Laws to the King, but to his Judges, and though the Judges be commanded by the King not to allow pardons in many cases, yet if the King by writing command the Judges to allow them, they ought to do it. I think, if the King think [181] in his conscience it be for the good of the Common-wealth, he sinneth not in it; but I hold not that the King may pardon him without sin, if any other Man be damnified by the Crime committed, unless he cause reparation to be made, as far as the party offending can do it:[424] And howsoever be it sin, or not sin, there is no power in *England* that may resist him, or speak evil of him lawfully.

La. Sir *Edw. Coke* denies not that; and upon that ground it is that the King, he says, may pardon high Treason; for there can be no high Treason, but against the King.[425]

[423] 13 Richard II st.2 c.1 (SR II 68–9).

[424] Cf. *Lev*., 180.

[425] Coke never explicitly justified the fact that kings could pardon treason; the general limitation on this power was that monarchs could not use the power to pardon if the result were to destroy the 'interests' of individual subjects (*Third Inst*., 236–8).

Ph. That's well; therefore he confesseth, that whatsoever the offence be, the King may pardon so much of it as is an injury to himself, and that by his own right, without breach of any Law positive, or natural, or of any grant, if his Conscience tell him that it be not to the dammage of the Common-wealth; and you know that to judge of what is good or evil to the Common-wealth, belongeth to the King only. Now tell me what it is which is said to be pardoned?

La. What can it be but only the offence? If a Man hath done a Murder and be pardoned for the same, is it not the Murder that is pardoned? [182]

Ph. Nay, by your favour, if a Man be pardoned for Murder or any other offence, it is the Man that is pardoned, the Murder still remains Murder. But what is pardon?

La. Pardon (as Sir *Edw. Coke* says, 3 *Inst*. p. 233) is deriv'd of *per* and *dono*, and signifies throughly to remit.[426]

Ph. If the King remit the Murder and not pardon the Man that did it, what does the remission serve for?

La. You know well enough that when we say a Murder, or any thing else is pardoned, all *English-men* understand thereby, that the punishment due to the offence is the thing remitted.

Ph. But for our understanding of one another, you ought to have said so at first. I understand now, that to pardon Murder or Felony is throughly to save the offender from all the punishment due unto him by the Law for his offence.

La. Not so; for Sir *Edw. Coke* in the same Chapter, p. 238. saith thus: [427]A Man commits Felony, and is attainted thereof, or is abjur'd; the King pardoneth the Felony without any mention of the attainder or abjuration, the pardon is void.

Ph. What is it to be attainted?

La. [428]To be attainted is, that his Blood be held in Law as stained and corrupted; so [183] that no inheritance can descend from him to his Children, or to any that make claim by him.

Ph. Is this attaint a part of the Crime, or of the Punishment?

[426] Ibid., 233.

[427] Quot. to end of speech (Ibid., 238).

[428] Attainder or attaint was the condition that followed abjuration of the realm (which is explained below) or conviction of a capital offence. H's account is right so far as it goes, but it omits the awkward fact that an attaint for treason could only be reversed by parliament (*First Inst*., 8a).

La. It cannot be a part of the Crime, because it is none of his own Act; 'tis therefore a part of the Punishment, *viz*. a disherison of the offender.

Ph. If it be a part of the Punishment due, and yet not pardoned together with the rest; then a pardon is not a through remitting of the Punishment as Sir *Edw. Coke* says it is. And what is Abjuration?

La. When a Clerk heretofore was convicted of Felony, he might have saved his life by abjuring the Realm; that is, by departing the Realm within a certain time appointed, and taking an Oath never to return. But at this day all Statutes for Abjuration are repeal'd.[429]

Ph. That also is a Punishment, and by a pardon of the Felony pardoned, unless a Statute be in force to the contrary. There is also somewhat in the Statute of 13 *Rich*. 2. *c*. 1. concerning the allowance of Charters of pardons, which I understand not well. The words are these; [430]No Charter of pardon for henceforth shall be allowed before our Justices for Murder, or for the death of a Man by awayt, or malice prepens'd, [184] Treason, or Rape of a Woman, unless the same be specified in the same Charter, for I think it follows thence, that if the King say in his Charter, that he pardoneth the Murder, then he breaketh not the Statute, because he specifies the offence; or if he saith, he pardoneth the killing by awayt, or of malice prepensed, he breaketh not the Statute, he specifies the offence. Also if he say so much as that the Judge cannot doubt of the Kings meaning to pardon him, I think the Judge ought to allow it, because the Statute saveth the Kings liberty and regality in that point; that is to say, the power to pardon him.[a] Such as are these words, notwithstanding any Statute to the contrary, are sufficient to cause the Charter to be allowed: For these words make it manifest, that the Charter was

[429] As usual, H chose to assume that statutes were a comprehensive guide to the legal situation. On Coke's account, the *common law* right to abjure the realm was a privilege attached to sanctuary. The *statutes* allowing abjuration were abolished by 1 Jac. c.25, with the result the common law revived. When sanctuary was abolished in 21 Jac., the common law right also disappeared (*Third Inst*., 115). An unrelated form of abjuration, created by the statute of 35 Eliz. c.1 §2 (SR IV 841–2), continued in use as a punishment for Catholics (*Third Inst*., 115–16, 217).

[430] Quot. to 'Charter' (13 Richard II st.2. c.1: SR II 68).

[a] ∼, such

not granted upon surprise, but to maintain and claim the Kings liberty and power to shew mercy, when he seeth cause. The like meaning have these words *Perdonavimus omnimodam interfectionem*; that is to say, we have pardoned the killing in what manner soever it was done. But here we must remember that the King cannot pardon, without sin, any dammage thereby done to another Man, unless he causes satisfaction to be made, as far as possibly the offender can, but is not bound to satisfie Mens thirst of revenge; for all revenge [185] ought to proceed from God, and under God from the King. Now (besides in Charters) how are these offences specified?

La. They are specified by their names, as Treason, Petit Treason, Murder, Rape, Felony, and the like.

Ph. Petit Treason is Felony, Murder is Felony, so is Rape, Robbery and Theft, and (as Sir *Edw. Coke* says)[431] Petit Larceny is Felony; now if in a Parliament-pardon, or in a Coronation-pardon[432] all Felonies be pardoned; whether is Petit Larceny pardoned, or not?

La. Yes certainly it is pardoned.

Ph. And yet you see it is not specified, and yet it is a Crime that hath less in it of the nature of Felony, than there is in Robbery. Do not therefore Rape, Robbery, Theft, pass under the pardon of all Felonies?

La. I think they are all pardoned by the words of the Statute, but those that are by the same Statute excepted; so that specification is needful only in Charters of pardon, but in general pardons not so. For the Statute 13 *Rich*. 2. *cap*. 1. forbids not the allowance of Parliament-pardons, or Coronation-pardons, and therefore the offences pardoned need not be specified, but may pass under the general word of all Felonies.[433] Nor is it likely that the members of the Parliament [186] who drew up their own pardons, did not

[431] All felonies were punishable by hanging; petty larceny was the non-capital crime of stealing goods valued at less than 12d. Coke made it clear that the two categories were mutually exclusive (*Third Inst*., 213), so the statement that the latter was a type of felony appears to rest on a misunderstanding. H seems to have been misled by Coke's 'definition' of larceny (that is, of larceny proper) as a 'felonious and fraudulent taking and carrying' away of goods (*Third Inst*., 107: quoted at p. 87 above).

[432] It was customary for monarchs to issue General Pardons both at their coronation and at the end of parliamentary sessions.

[433] 13 Richard II st.2. c.1 (SR II 68–9).

mean to make them as comprehensive as they could: And yet Sir *Edw. Coke*, 1[a]. *Inst. Sect.* 745. at the word *Felony*, seemeth to be of another mind; for *Piracy* is one species of *Felony*, and yet when certain *English-men* had committed *Piracy* in the last years of Queen *Elizabeth*, and came home into *England*, in the beginning of the Reign of King *James*, trusting to his Coronation-pardon of all *Felonies*; they were indicted (Sir *Edw. Coke* was then Attorney General) of the *Piracy* before Commissioners according to the Statute of 28 *H.* 8. and being found *Guilty* were hang'd. The reason he alledgeth for it is, that it ought to have been specified by the name of *Piracy* in the pardon, and therefore the pardon was not to be allowed.[434]

Ph. Why ought it to have been specified more than any other *Felony*? He should therefore have drawn his argument from the Law of reason.

La. Also he does that; for the Tryal (he says) was by the Common-Law, and before Commissioners not in the Court of the Lord Admiral, by the Civil-Law, therefore he says it was an offence whereof the Common-Law could not take notice because it could not be Tryed by twelve Men.[435] [187]

Ph. If the Common-Law could not, or ought not to take notice of such offences, how could the offenders be Tryed by twelve Men, and found *Guilty*, and hang'd, as they were?[436] If the Common-Law take no notice of *Piracy*, what other offence was it for which they were hang'd? Is *Piracy* two *Felonies*, for one of which a Man shall be hang'd by the Civil-Law, and for the other by the Common-Law? Truly I never read weaker reasoning in any Author of the Law of *England*, than in Sir *Edw. Coke*'s Institutes, how well soever he could plead.

La. Though I have heard him much reprehended by others, as well as by you; yet there be many excellent things, both for subtility, and for truth in these his Institutes.

[a] 2

[434] 28 Henry VIII c.15 §1–2 (SR III 671). *First Inst.*, 391a; *Third Inst.*, 112.

[435] 'It could not be tried, being out of all towns and Counties' (*Third Inst.*, 112); juries were competent judges of the facts only within the borders of their county.

[436] H misrepresents a tortuous distinction. In Coke's view, the statute of 28 Henry VIII (28 Henry VIII c.15 §1–2: SR III 671) 'did not alter the offence, or make the offence felony, but leaveth the offence as it was before this Act, *viz.* felony only by the Civill law, but giveth a mean of triall by the Common law' (*Third Inst.*, 112).

Ph. No better things than other Lawyers have that write of the Law, as of a Science: His citing of *Aristotle*, and of *Homer*, and of other Books which are commonly read to Gown-men, do, in my opinion, but weaken his Authority, for any Man may do it by a Servant; but seeing the whole scene of that time is gone and past, let us proceed to somewhat else. Wherein doth an Act of *Oblivion* differ from a Parliament-pardon?[437]

La. This word *Act of Oblivion* was never in our Law-Books before the 12 *Car*. 2. [188] *c*. 11.[438] and I wish it may never come again; but from whence it came you may better know perhaps than I.

Ph. The first, and only *Act of Oblivion* that ever passed into a Law, in any State that I have read of, was that *Amnestia*, or *Oblivion* of all Quarrels between any of the Citizens of *Athens*, at any time before that Act, without all exception of Crime, or Person. The occasion whereof was this. The *Lacedemonians* having totally subdued the *Athenians*, entred into the City of *Athens*, and ordained that the People should choose thirty Men of their own City to have the Soveraign Power over them. These being chosen behav'd themselves so outragiously, as caused a Sedition, in which the Citizens on both sides were daily slain. There was then a discreet Person that propounded to each of the parties this proposition, that every Man should return to his own, and forget all that was past; which proposition was made, by consent on both sides, into a publick Act, which for that Cause was called an *Oblivion*.[439] Upon the like disorder hapning in *Rome* by the Murder of *Julius Caesar*, the like Act was propounded by *Cicero*, and indeed passed, but was within few days after broken again by *Marcus Antonius*.[440] In imitation of this Act was made the Act of 12 *Car*. 2. *c*. 11. [189]

La. By this it seems, that the Act of *Oblivion* made by King *Charles*, was no other than a Parliament-pardon, because it containeth a great number of exceptions, as the other Parliament-pardons do, and the Act of *Athens* did not.

Ph. But yet there is a difference between the late Act of *Oblivion* made here, and an ordinary Parliament-pardon: For concerning

[437] See above, p. 40.

[438] 'An Act of Free and General Pardon Indempnity and Oblivion' (SR V 226–34).

[439] See above, p. 40.

[440] See ibid.

a fault pardoned in Parliament by a general word, a suit in Law may arise about this, whether the offender be signified by the word, or not, as whether the pardon of all *Felonies*, be a pardon of *Piracy*, or not: For you see by Sir *Edw. Coke*'s reports, that notwithstanding a pardon of *Felony*, a Sea-*Felony* (when he was Attourney General) was not pardoned.[441] But by the late Act of *Oblivion*, which pardoned all manner of offences committed in the late Civil War, no question could arise concerning Crimes excepted. First, because no Man can by Law accuse another Man of a Fact, which by Law is to be forgotten. Secondly, because all Crimes may be alledged, as proceeding from the Licentiousness of the time, and from the silence of the Law occasion'd by the Civil War, and consequently (unless the offenders Person also were excepted, or unless the Crime were committed before the War began) are within the Pardon.[442] [190]

La. Truly I think you say right: For if nothing had been pardoned, but what was done by occasion of the War, the raising of the War it self had not been pardoned.

Ph. I have done with Crimes and Punishments, let us come now to the Laws of *Meum* and *Tuum*.

La. We must then examine the Statutes.

Ph. We must so, what they command and forbid, but not dispute of their Justice: For the Law of Reason commands that every one observe the Law which he hath assented to, and obey the Person to whom he hath promised obedience and fidelity.

[*La*.][a] Then let us consider next the Commentaries of Sir *Edw. Coke* upon *Magna Charta*, and other Statutes.[443]

Ph. For the understanding of *Magna Charta*, it will be very necessary to run up into Antient times, as far as History will give us leave, and consider not only the Customs of our Ancestors the *Saxons*, but also the Law of nature (the most Antient of all Laws) concerning the original of Government, and acquisition of Property, and concerning Courts of Judicature. And first, it is evident, that Dominion, Government, and Laws, are far more

[441] See above, p.132.

[442] This is most misleading if it is taken to imply that there were no offences excluded from the Act. A number of crimes could still be prosecuted, including piracy, murder, rape, and witchcraft (12 Car II c.11 §10: SR V 228).

[a] The first edition makes this sentence part of the previous speech.

[443] Coke's *Second Institutes*.

Antient than History, or any other writing, and that the beginning of all Dominion amongst Men was in [191] Families; in which, first, the Father of the Family by the Law of nature was absolute Lord of his Wife and Children.[444] Secondly, made what Laws amongst them he pleased. Thirdly, was Judge of all their Controversies. Fourthly, was not obliged by any Law of Man to follow any Counsel, but his own. Fifthly, What Land soever the Lord sat down upon, and made use of for his own, and his Families benefit, was his Propriety by the Law of First-Possession,[445] in case it was void of Inhabitants before, or by the Law of War, in case they conquer'd it. In this Conquest what Enemies they took and saved were their Servants:[446] Also such Men as wanting Possessions of Lands, but furnished with Arts necessary for Mans life, came to dwell in the Family for Protection, became their Subjects, and submitted themselves to the Laws of the Family: And all this is consonant, not only to the Law of nature, but also to the practice of Mankind[a] set forth in History Sacred, and Praphane.

La. Do you think it lawful for a Lord that is the Soveraign Ruler of his Family, to make War upon another like Soveraign Lord, and dispossess him of his Lands?

Ph. It is Lawful, or not Lawful according to the intention of him that does it. For, First, being a Soveraign Ruler, he is [192] not subject to any Law of Man; and as to the Law of God, where the intention is justifiable, the action is so also. The intention may be Lawful in divers Cases by the right of nature; one of those Cases is, when he is constrained to it by the necessity of subsisting. So the Children of *Israel*, besides that their leaders, *Moses* and *Joshua* had an immediate command from God to dispossess the *Canaanites*,[447] had also a just pretence to do what they did from the right of nature, which they had to preserve their lives, being unable otherwise to subsist. And as their preservation, so also is their security a just pretence of invading those whom they have just cause to fear, unless sufficient

[444] Cf. *El*., II v 3.

[445] Cf. *El*., I xvii 5; *De C*. iii 18; *Lev*., 78.

[446] A common etymology (alluded to at *Lev*., 104) traced *servus* (a slave) to *servatus* (one who has been saved).

[a] Man-kind: interlinear hyphen.

[447] *Joshua* i 2–4.

caution[448] be given to take away their fear, which Caution (for any thing I can yet conceive) is utterly impossible. Necessity, and Security are the principal justifications, before God, of beginning War. Injuries receiv'd justifie a War defensive; but for reparable injuries, if Reparation be tendred, all invasion upon that Title is Iniquity.[449] If you need examples, either from Scripture, or other History concerning this right of nature in making War, you are able enough from your own reading, to find them out at your leisure.

La. Whereas you say, that the Lands so won by the Soveraign Lord of a Family, are [193] his in propriety, you deny (methinks) all property to the Subjects, how much soever any of them hath contributed to the Victory.

Ph. I do so, nor do I see any reason to the contrary: For the Subjects, whencesoever[a] they come into the Family, have no title at all to demand any part of the Land, or any thing else but security, to which also they are bound to contribute their whole strength, and, if need be, their whole fortunes: For it cannot be supposed that any one Man can protect all the rest with his own single strength: And for the Practice, it is manifest in all Conquests, the Land of the vanquished is in the sole power of the Victor, and at his disposal. Did not *Joshua* and the high-Priest divide the Land of *Canaan* in such sort among the Tribes of *Israel*, as they pleased?[450] Did not the *Roman* and *Graecian* Princes and States according to their own discretion, send out the Colonies to inhabit such Provinces as they had Conquered? Is there at this day among the *Turks* any inheritor of Land, besides the *Sultan*? And was not all the Land in *England* once in the hands of *William* the Conqueror?[451] Sir *Edw. Coke* himself confesses it; therefore it is an universal truth, that all Conquer'd Lands, presently[452] after Victory, are the Lands of him that Conquer'd them.[453] [194]

[448] =surety.

[449] Cf. *El*., I xvi 9; *De C*., iii 10; *Lev*., 76.

[a] whether The argument appears to be that no consideration can override the duty of a subject to furnish any necessary assistance.

[450] *Joshua* xiv 1 (cf. *Lev*., 128).

[451] Cf. *Lev*., 128; *Beh*., 195 (EW VI 312).

[452] =immediately

[453] It is not clear what passage H is referring to. If 'presently' [=immediately] is taken literally, he has misunderstood; although Coke held that conquerors enjoyed the power to

La. But you know that all Soveraigns are said to have a double Capacity; *viz*. a natural Capacity, as he is a Man, and a politick Capacity, as a King. In his politick Capacity I grant you, that King *William* the Conqueror was the proper, and only owner once of all the Land in *England*, but not in his natural Capacity.[454]

Ph. If he had them in his politick Capacity, then they were so his own as not to dispose of any part thereof, but only to the benefit of his People, and that must be either by his own, or by the Peoples discretion; that is, by Act of Parliament. But where do you find that the Conqueror disposed of his Lands (as he did some to *English-men*, some to *French-men*, and some to *Normans*) to be holden by divers Tenures, as Knight-service, Soccage,[455] &*c*. by Act of Parliament? Or that he ever called a Parliament to have the assent of the Lords and Commons of *England* in disposing of those Lands he had taken from them? Or for retaining such and such Lands in his own hands by the name of Forrests for his own Recreation, or Magnificence? You have heard perhaps that some Lawyers, or other Men reputed wise and good Patriots have given out, that all the Lands which the Kings of *England* have possessed, have been given them by the People, to the end that [195] they should therewith defray the Charges of their Wars, and pay the wages of their Ministers, and that those Lands were gained by the Peoples Money; for that was pretended in the late Civil War, when they took from the King his Town of *Kingston* upon *Hull*;[456] but I know you do not think that the pretence was just. It cannot therefore be denyed but that Lands[a] which *William* the Conqueror gave away to *English-men* and others, and which they now hold by his Letters Patents, and other conveyances, were properly, and really his own, or else the Titles of them that now hold them must be invalid.

change the laws of conquered territories (and therefore to alter their property distribution), he thought a Christian Kingdom would keep its 'ancient laws' unless its conqueror chose otherwise (Coke, *Seventh Reports*, Calvin's case, 17b: ER LXXVII 398).

[454] See below, pp. 138–9.

[455] A tenure originally granted in exchange for merely agricultural services.

[456] For this parliamentarian claim, see Husbands, *Exact collection*, 266; *Beh.*, 197 (EW VI 313).

[a] Land

La. I assent. As you have shewed me the beginning of Monarchies, so let me hear your opinion concerning their growth.

Ph. Great Monarchies have proceeded from small Families. First, by War, wherein the Victor not only enlarged his Territory, but also the number and riches of his Subjects. As for other forms of Common-wealths,[a] they have been enlarged otherways. First, by a voluntary conjunction of many Lords of Families into one great Aristocracie. Secondly, by Rebellion proceeded first, *Anarchy*, and from *Anarchy* proceeded any form that the Calamities of them that lived therein did prompt them to; whether it were that they chose an Hereditary King, or [196] an elective King for life, or that they agreed upon a Council of certain Persons (which is *Aristocracy*) or a Council of the whole People to have the Soveraign Power, which is *Democracy*.

After the first manner which is by War, grew up all the greatest Kingdoms in the World, *viz*. the *Aegyptian, Assyrian, Persian* and the *Macedonian Monarchy*; and so did the great Kingdoms of *England, France*, and *Spain*.

The second manner was the original of the *Venetian Aristocracy*;[b] by the third way which is Rebellion, grew up [Anarchy][c] in divers great Monarchies, perpetually changing from one form to another; as in *Rome* rebellion against Kings produced *Democracy*, upon which the Senate usurped under *Sylla*, and the People again upon the Senate under *Marius*, and the Emperor usurped upon the People under *Caesar* and his Successors.

La. Do you think the distinction between natural and politick Capacity is insignificant?[457]

Ph. No; If the Soveraign Power be in an assembly of Men, that Assembly, whether it be *Aristocratical*, or *Democratical*, may possess Lands, but it is in their politick Capacity, because no natural Man has any right to those Lands, or any part of them, in the same manner they can command an [197] Act by plurality of Commands, but the Command of any one of them is of no effect. But when the Soveraign power is in one Man, the Natural and Politick Capacity are in the same Person, and as to possession of

[a] Interlinear hyphen.
[b] ~,
[c] Cropsey prefers to emend by deletion of 'in'.
[457] =meaningless.

Lands undistinguishable:[458] But as to the Acts and Commands, they may be well distinguished in this manner. Whatsoever a Monarch does Command, or do by consent of the People of his Kingdom, may properly be said to be done in his politick Capacity; and whatsoever he Commands by word of Mouth only, or by Letters signed with his hand, or Sealed with any of his private Seals is done in his natural Capacity: Nevertheless, his publick Commands, though they be made in his politick Capacity, have their original from his natural Capacity.[459] For in the making of Laws (which necessarily requires his assent) his assent is natural: Also those Acts which are done by the King previously to the passing of them under the Great Seal of *England*, either by word of Mouth, or warrant under his Signet, or privy Seal, are done in his natural Capacity; but when they have past the Seal of *England*, they are to be taken as done in his politick Capacity.[460]

La. I think verily your distinction is good: For natural Capacity, and politick Capacity signifie no more than private and [198] publick right. Therefore leaving this argument let us consider in the next place, as far as History will permit, what were the Laws and Customs of our Ancestors.

Ph. The *Saxons*, as also all the rest of *Germany* not Conquer'd by the *Roman* Emperors, nor compelled to use the imperial Laws, were a Savage and Heathen People, living only by War and Rapine; and as some learned Men in the *Roman* Antiquities affirm, had their name of *Germans* from that their ancient trade of life, as if

[458] In *Lev*., H noted that William had 'divers Lands reserved to his own use . . . not reserved for his Maintenance in his Publique, but in his Naturall capacity'; but he stressed that this arrangement implied no limitation on William's right to tax (*Lev*., 129).

[459] Parliamentarians 'pretended that the King was always virtually in the two Houses of Parliament, making a distinction between his Person Natural and Politick, which made the Impudence the greater, beside the folly of it: for this was but an University quibble, such as Boys make use of in maintaining (in the Schools) such Tenents, as they cannot otherwise defend' (*Beh*., 203; EW VI 318). The account of the distinction here avoids the possibility of an impersonal person politick acting against the monarch's natural person.

[460] *Lev*. distinguishes between the public and private servants of the monarch (*Lev*., 123–4), but never between his public and private actions. *Beh*. states that 'the King, though as a Father of Children, and a Master of Domestic Servants, yet he commands the People in general never but by a precedent Law, and as a Politick, not a Natural Person' (*Beh*., 83: EW VI 227). For the role of the Great Seal in marking the distinction, see *Answer to Bramhall*, 113–4 (EW IV 370).

Germans and *Hommes de guerre* were all one.[461] Their rule over their Family, Servants and Subjects was absolute,[462] their Laws no other than natural Equity; written Law they had little, or none, and very few there were in the time of the *Caesars* that could write, or read. The right to the Government was either Paternal, or by Conquest, or by Marriages. Their succession to Lands was determined by the pleasure of the Master of the Family, by Gift, or Deed in his life time; and what Land they disposed not of in their life time, descended after their death to their Heirs. The Heir was the Eldest Son; The issue of the Eldest Son failing, they descended to the younger Sons in their order, and for want of Sons, to the Daughters joyntly, as to one Heir, or to be divided amongst them, and so to descend to their Heirs in the same man-[199]ner: And Children failing, the Uncle by the Fathers, or Mothers side (according as the Lands had been the Fathers or the Mothers) succeeded to the inheritance, and so continually to the next of blood. And this was a natural descent, because naturally the nearer in Blood, the nearer in kindness, and was held for the Law of nature, not only amongst the *Germans*, but also in most Nations before they had a written Law.

The right of Government, which is called *Jus Regni* descended in the same manner, except only that after the Sons, it came to the eldest Daughter first, and her Heirs; the reason whereof was, that Government is indivisible.[463] And this Law continues still in *England*.[464]

[461] Some writers made a connection between 'German' and '*guerre*'; the usual etymology traced it to 'ger' or 'gar' man, meaning all or wholly man (Kliger, *Goths in England*, 72–5). The former etymology is found in a work of 1670 dedicated to the Duke of Newcastle (Sheringham, *De Anglorum Gentis Origine*, 57), but H had no need of such a stimulus. In *El.*, he had held that 'the histories of our ancestors, the old inhabitants of Germany' described 'the estate of hostility and war' (*El.*, I xiv 12).

[462] According to *Beh.*, the Saxons were only 'a League of divers petty *German* Lords and States . . . Nor were those Lords, for the most part the Sovereigns at home in their own Country, but chosen by the People for the Captains of the Forces they brought with them' (*Beh.*, 125–6; EW VI 259).

[463] Cf. *El.*, II iv 14–16; *De C.*, ix 11–19; *Lev.*, 100–101.

[464] If H intended to imply that English monarchs were allowed to select their own successors, his claim was most misleading. Edward VI attempted to use his prerogative power to leave the throne to the Protestant Lady Jane Grey in preference to his Catholic sister Mary, but the episode was subsequently regarded as simply an attempted usurpation.

La. Seeing all the Land which any Soveraign Lord possessed, was his own in propriety; how came a Subject to have a propriety in their Lands?

Ph. There be two sorts of Propriety. One is, when a Man holds his Land from the gift of God only, which Lands *Civilians* call *Allodial* which in a Kingdom no Man can have but the King.[465] The other is when a Man holds his Land from another Man as given him, in respect of service and obedience to that Man, as a Fee. The first kind of propriety is absolute, the other is in a manner conditional, because given for some [200] service to be done unto the giver. The first kind of propriety excludes the right of all others; the second excludes the right of all other Subjects to the same Land, but not the right of the Soveraign, when the common good of the People shall require the use thereof.[466]

La. When those Kings had thus parted with their Lands, what was left them for the maintenance of their Wars, either offensive, or defensive; or for the maintenance of the Royal Family in such manner as not only becomes the dignity of a Soveraign King, but is also necessary to keep his Person and People from contempt.

Ph. They have means enough; and besides what they gave their Subjects, had much Land remaining in their own hands afforrested for their recreation: For you know very well that a great part of the Land of *England* was given for Military service to the great Men of the Realm, who were for the most part of the Kings kindred, or great Favourites, much more Land than they had need of for their own Maintenance; but so charged with one, or many Souldiers, according to the quantity of Land given, as there could be no want of Souldiers, at all times, ready to resist an invading Enemy: Which Souldiers those Lords were bound to furnish, for a time certain, at their own [201] Charges. You know also, that the whole Land was divided into Hundreds, and those

It was arguable that parliamentary statute could confer such a right on the monarch; an Act of 1543 (35 Henry VIII c.1 §6: SR III 956) gave Henry VIII the power to determine the line of succession in what must have seemed the unlikely event of all his children dying without issue. But after 1603, the notion became unacceptable (the will in which Henry had exercised this power had pointedly ignored the Stuart line).

[465] Calvinus, *Lexicon*, s.v. 'Allodium'. Coke noted that 'in the law of England we have not properly *Allodium*' (*First Inst*., 1b).

[466] Cf. *El*., II viii 8; *De C*, xii 7; *Lev*., 128.

again into Decennaries; in which Decennaries all Men even to Children of 12 years of age, were bound to take the Oath of Allegiance: And you are to believe, that those Men that hold their Land by the service of Husbandry, were all bound with their Bodies, and Fortunes to defend the Kingdom against invaders by the Law of nature: And so also such as they called Villains, and held their Land by baser drudgery, were obliged to defend the Kingdom to the utmost of their power. Nay, Women, and Children in such a necessity are bound to do such service as they can, that is to say, to bring Weapons and Victuals to them that fight, and to Dig: But those that hold their Land by service Military, have lying upon them a greater obligation: For read and observe the form of doing homage, according as it is set down in the Statute of 17 *Edw.* 2. which you doubt not, was in use before that time, and before the Conquest.

La. [467]I become your Man for Life, for Member and for worldly Honour, and shall owe you my faith for the Lands that I hold of you.

Ph. I pray you expound it.

La. I think it is as much, as if you should say, I promise you to be at your Command; [202] to perform with the hazard of my Life, Limbs and all my Fortune, as I have charged my self to the reception of the Lands you have given me, and to be ever faithful to you. This is the form of Homage done to the King immediately; but when one Subject holdeth Land of another by the like Military service, then there is an exception added; *viz*. saving the faith I owe to the King.

Ph. Did he not also take an Oath?

La. Yes; which is called the Oath of *Fealty*; I shall be to you both faithful, and lawfully shall do such customs and services, as my duty is to you at the terms assigned; so help me God, and all his Saints. But both these services, and the services of Husbandry were quickly after turned into Rents, payable either in Money, as in *England*; or in Corn, or other Victuals, as in *Scotland* and *France*. When the service was Military, the Tenant was for the most part bound to serve the King in his Wars with one, or more Persons, according to the yearly value of the Land he held.

[467] Quot. to end of speech. It is the form of homage printed among the statutes of 17 Edward II in all editions of the statute book (SR I 227).

Ph. Were they bound to find Horse-men, or Foot-men?

La. I do not find any Law that requires any Man, in respect of his Tenancie, to serve on Horseback.

Ph. Was the Tenant bound, in case he were called, to serve in Person? [203]

La. I think he was so in the beginning: For when Lands were given for service Military, and the Tenant dying left his Son and Heir, the Lord had the custody both of Body and Lands till the Heir was twenty one years old; and the reason thereof was, that the Heir till that Age of twenty one years, was presum'd to be unable to serve the King in his Wars, which reason had been insufficient, if the Heir had [not] been bound to go to the Wars in Person. Which (methinks) should ever hold for Law, unless by some other Law it come to be altered. These services together with other Rights, as Wardships[,] first[a] possession of his Tenants inheritance, Licenses for Alienation, Felons Goods, Felons Lands, if they were holden of the King, and the first years profit of the Lands, of whomsoever they were holden, Forfeitures, Amercements, and many other aids could not but amount to a very great yearly Revenue. Add to this all that which the King might reasonably have imposed upon Artificers and Tradesmen (for all Men, whom the King protecteth, ought to contribute towards their own protection) and consider then whether the Kings of those times had not means enough, and to spare (if God were not their Enemy) to defend their People against Forreign Enemies, and also to compell them to keep the Peace amongst themselves. [204]

Ph. And so had had the succeeding Kings, if they had never given their rights away, and their Subjects always kept their Oaths, and promises. In what manner proceeded those Ancient *Saxons*, and other Nations of *Germany*, especially the Northern parts, to the making of their Laws?

La. Sir *Edw. Coke* out of divers *Saxon* Laws gathered and published in *Saxon* and *Latine* by Mr. *Lambert*, inferreth, that the *Saxon* Kings, for the making of their Laws, called together the Lords and Commons, in such manner as is used at this day in *England*.[468] But by those Laws of the *Saxons* published by

[a] ~,

[468] *First Inst*., 110a.

Mr. *Lambert*, it appeareth, that the Kings called together the Bishops, and a great part of the wisest and discreetest Men of the Realm, and made Laws by their advice.[469]

Ph. I think so; for there is no King in the World, being of ripe years and sound mind, that made any Law otherwise; for it concerns them in their own interest to make such Laws as the people can endure, and may keep them without impatience, and live in strength and courage to defend their King and Countrey, against their potent neighbours. But how was it discerned, and by whom was it determined, who were those wisest and discreetest Men? It is a hard matter to know who is wisest in our times. We know well enough who choo-[205]seth a Knight of the Shire, and what Towns are to send Burgesses to the Parliament, therefore if it were determined also in those dayes, who those wise Men should be, then, I confess, that the Parliaments of the old *Saxons*, and the Parliaments of *England* since are the same thing, and Sir *Edw. Coke* is in the right. Tell me therefore, if you can, when those Towns which now send Burgesses to the Parliament, began to do so, and upon what cause one Town had this priviledge, and another Town, though much more populous, had not.

La. At what time began this custom I cannot tell; but I am sure it is more ancient than the City of *Salisbury*; because there come two Burgesses to Parliament for a place near to it, called *Old Sarum*, which (as I Rid in sight of it) if I should tell a stranger that knew not what the word *Burgess* meant, he would think were a couple of Rabbets, the place looketh so like a long Cony-Borough.[470] And yet a good Argument may be drawn from thence, that the Towns-men[a] of every Town were the Electors of their own Burgesses, and Judges of their discretion; and that the Law, whether they be discreet or not, will suppose them to be discreet till the contrary be apparent. Therefore where it is said, that the King called together the more discreet Men of his Realm; [206] it must be understood of such Elections as are now in use: By which it is manifest, that those great and general Moots assembled by

[469] Lambarde, *Archaionomia*, 1, 45, 57.

[470] Old Sarum was already a notorious rotten borough; even in 1642, a royalist writer casting doubt on Parliament's claim to represent the nation could remark that '*Old Sarum* shall have as many Votes in Parliament as the Citty of London, or County of Wiltes' (*View of a printed book*, sig.D2.).

[a] Interlinear hyphen.

the old *Saxon* Kings, were of the same nature with the Parliaments assembled since the Conquest.[471]

Ph. I think your reason is good: For I cannot conceive, how the King, or any other but the inhabitants of the Boroughs themselves, can take notice of the discretion, or sufficiency of those they were to send to the Parliament. And for the Antiquity of the Burgess-Towns, since it is not mentioned in any History, or certain Record now extant, it is free for any Man to propound his conjecture.[472] You know, that this Land was invaded by the *Saxons* at several times, and conquered by pieces in several Wars; so that there were in *England* many Kings at once, and every of them had his Parliament, and therefore according as there were more, or fewer walled Towns within each Kings Dominion, his Parliament had the more, or fewer Burgesses: But when all these lesser Kingdoms were joyned into one, then to that one Parliament came Burgesses from all the Burroughs of *England*. And this perhaps may be the reason, why there be so many more such Burroughs in the West, than in any other part of the Kingdom; the West being more populous, and also more [207] obnoxious[473] to invaders, and for that cause having greater store of Towns Fortified. This I think may be the original of that priviledge which some Towns have to send Burgesses to the Parliament, and others have not.

La. The Conjecture is not improbable, and for want of greater certainty, may be allowed.[474] But seeing it is commonly receiv'd, that for the making of a Law, there ought to be had the assent of the Lords Spiritual and Temporal; whom do you account in the Parliaments of the old *Saxons* for Lords Temporal, and whom for Lords Spiritual? For the Book called *The mode of holding Parliaments*, agreeth punctually with the manner of holding

[471] Contrast *Beh*.: 'I do not doubt but that before the Conquest some discreet Men, and known to be so by the King, were called by special Writ to be of the same Councel, though they were not Lords; but that is nothing to the House of Commons: The Knights of Shires and Burgesses were never called to Parliament for ought that I know, till the beginning of the Reign of *Edward* the first, or the latter end of the Reign of *Henry* the third' (*Beh*., 127–8: EW VI 260–1).

[472] Note that *Ph*. does not endorse the truth of *La*.'s theory; in the absence of conflicting evidence, he notes that it has the merit of explaining how a burgess could be known to be discreet.

[473] =vulnerable.

[474] Note the agreement of both speakers that the whole question is conjectural.

them at this day, and was written (as Sir *Edw. Coke* says) in the time of the *Saxons*, and before the Conquest.[475]

Ph. Mr. *Selden* (a greater Antiquary than Sir *Edw. Coke*) in the last Edition of his Book of Titles of *Honour* says, that that Book called the *Mode, &c.* was not written till about the time of *Rich.* 2. and seems to me to prove it.[476] But howsoever that be, it is apparent by the *Saxon* Laws set forth by Mr. *Lambert*, that there were always called to the Parliament, certain great Persons called Aldermen[a], *alias* Earls; and so you have a House of Lords, and a House of Commons. Also you will find in the same place, that after the *Saxons* had received the Faith of Christ, [208] those Bishops that were amongst them, were always at the great Mootes, in which they made their Laws.[477]

Thus you have a perfect *English* Parliament, saving that the name of Barons was not amongst them, as being a *French* Title,[478] which came in with the Conqueror.

[475] *Fourth Inst.*, 12.

[476] The second edition (1631); the third edition (1672) is substantially the same. Selden, *Titles of Honor* (1631), 739–43. *The manner of holding parliaments in England* had gone through at least four editions since it had first appeared in print in 1641.

[a] Interlinear hyphen: Alder-men.

[477] Lambarde, *Archaionomia*, 1, 45.

[478] Cf. *Lev.*, 46 (referring to Selden, *Titles of Honor*, 687–8). *Beh.* explains the importance that H attached to this: the Saxons (like the Normans) were a Germanic people, which had evolved out of a warrior host drawn from 'a League of divers petty *German* Lords and States' (*Beh.*, 125–6: EW VI 259). The leaders of the constituent parts of this host had kept the right to be part of their sovereign's Great Council and form his highest court. This custom had 'continued . . . to this day. But . . . they have their Priviledge [of sitting in the Lords] by the only Name of Baron, a Name receiv'd from the Ancient *Gaules*, amongst whom that name signified the King's Man, or rather one of his Great Men: By which it seems to me, that though they gave him Counsel, when he requir'd it, yet they had no Right to make War upon him, if he did not follow it' (*Beh.*, 127: EW VI 260).

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THOMAS HOBBES

QUESTIONS RELATIVE TO HEREDITARY RIGHT

EDITED BY

QUENTIN SKINNER

CUESTIONES RELACIONADAS CON EL DERECHO HEREDITARIO

TEXTUAL INTRODUCTION

Chatsworth MS Hobbes D. 5 is a reply by Hobbes to a question about the rights of hereditary kings.[1] The manuscript consists of two conjugate quarto leaves formed from a single sheet 22 × 35 cm. folded in two, making four pages. An endorsement on the fourth page reads: 'Questions relative to Hereditary Right. Mr. Hobbes'. The watermark shows a curved hunting-horn within a shield surmounted by a coronet with three fleur-de-lys; below the shield is an elongated '4' with the monogram 'WR' at its base.[1] Unfortunately this design is of no help in determining the date of the manuscript, as it was common in Holland as well as England throughout the latter part of the seventeenth century.[2] The entire manuscript amounts to only forty-nine lines, but it seems to have been part of a longer disputation which has since been lost. The first page is marked '9' at the top right-hand corner, the second '10' at the top left. (Except for the endorsement, the other two pages are blank.) These marks of pagination are in the same hand and ink as Hobbes's response to the question put to him. The manuscript forms part of the collection of papers left by Hobbes at Chatsworth at his death, and has remained there ever since.

The Hereditary Right manuscript (as I shall call it) is in three different hands. The hand of the questioner has previously been identified as that of William Cavendish, third earl of Devonshire.[3] But the writing is in fact that of his eldest son, also named William Cavendish, who succeeded as fourth earl in 1684 and became first duke of Devonshire ten years later. I give my grounds in the Historical Introduction for believing that the Hereditary Right manuscript should be dated to 1679, and more specifically to the early summer of that year. If one compares the handwriting of the question put to Hobbes in the Hereditary Right manuscript with letters written by

[1] Heawood 1930, 284–5 suggests that the letters WR may imply that the monogram was first used by the successors of the sixteenth-century Strasbourg printer Wendelin Riehel.

[2] Heawood 1950, 123–4 and Plates 344–9 illustrate twelve marks from the period between 1655 and 1705 in which all these elements appear, three from Amsterdam, three from Leiden, three from England, and three of unknown provenance.

[3] Rogow 1986, 253; Beal 1987, 583.

the fourth earl at around the same time, it becomes clear beyond doubt that the question is in the same hand.[4]

A number of biographical considerations confirm that the question was put to Hobbes by the fourth rather than the third earl. The question he asks is whether an unsuitable heir can be excluded from succeeding to a crown. This very issue became the most burning topic in English politics during the Exclusion Crisis of 1679–81. By that time, however, the third earl had withdrawn from public life and had gone into retirement, initially at Chatsworth and latterly at his house in Roehampton, where he died in 1684. By contrast, his eldest son was active as a member of the House of Commons (in which he sat as Lord Cavendish) throughout these years. When the discovery of the alleged Popish Plot in the autumn of 1678 first raised acute fears about the succession, Cavendish served on a committee to enquire into the plot itself, and later helped to draft a Bill protesting against the growth of popery. When the proposal to exclude the heir presumptive, James duke of York, was put forward in the House of Commons in May 1679, and again in December 1680, Cavendish was not only present but spoke in all three of the crucial debates. It is not surprising, therefore, to find him putting to Hobbes the question of whether it is possible to exclude an unsuitable heir. Not only did he have a strong practical interest in the issue, but it must have seemed almost an act of family piety to raise the matter with Hobbes. Besides being celebrated for his views about the theory of sovereignty, Hobbes had served as tutor and secretary to Cavendish's father for many years, and was still living at Chatsworth in his final retirement.

The answer to Cavendish's question is in the handwriting of Hobbes's amanuensis, James Wheldon, but it includes some small corrections in a yet further hand. These alterations are entered in a manner that closely resembles Hobbes's way of correcting James Wheldon's fair copy of *Behemoth*,[5] and this leads me to believe that the corrections to the Hereditary Right manuscript must also have been made by Hobbes himself. That Hobbes's answer is in James

[4] See the letters under the prefix 18 in the *Index of Letters at Chatsworth: First Series, to 1839*. Letter 18–01 and Letter 18.2 are both in the hand of (and are signed by) the fourth earl of Devonshire. Letter 18–01 is addressed to Lord Middleton and dated 1684; Letter 18.2 is addressed to Lady Russell and dated 1688.

[5] St John's College Oxford MS 13: *Behemoth or the Long Parliament. By Thomas Hobbes of Malmsbury*. A presentation copy in the hand of James Wheldon, with additions and excisions by Hobbes.

Wheldon's handwriting is beyond doubt. Wheldon had been regularly acting as Hobbes's amanuensis from as early as the mid-1650s.[6] The first evidence that Hobbes was having to dictate his letters dates from October 1656, when we find François du Verdus anxiously exclaiming that Hobbes's latest communication is in the hand of a scribe.[7] If one compares the letters written by Wheldon for Hobbes in the late 1670s with the handwriting of the Hereditary Right manuscript, it becomes clear that the latter is also in Wheldon's hand.[8]

The fact that the Hereditary Right manuscript was produced by Wheldon is a reason not for doubting but for accepting that it should be regarded as authentically Hobbes's work. As early as 1650 Hobbes had begun to suffer from what John Aubrey described as a shaking palsy,[9] and no extended piece of his handwriting survives from any period later than 1654.[10] Hobbes's correspondents were used to accepting letters in Wheldon's hand as proof that they came from Hobbes. For example, we find François du Prat informing Hobbes in 1663 that 'in M.^{r} Sorbiere's absence, I take upon me to answer a Letter w.^{ch}, being att his house, I knew to be one of y.^{rs}, by y^{e}. superscription w^{ch}. is in Jame's hand.'[11] We may be said to have at least as good reason for treating the Hereditary Right manuscript as Hobbes's own work.

The principles I have adopted in transcribing the manuscript are those of the Clarendon edition as a whole. I need only stress that original orthography and punctuation have been preserved, but not lineation, and that all words underlined in the manuscript have been rendered in italics. The manuscript was first printed in Skinner

[6] Malcolm 1994, xxiii. See also Hardwick MS 19, James Wheldon's account book 1661–1708. The earliest surviving entries, dated January 1661, show that Wheldon was already being paid by Hobbes. The payments thereafter continued uninterruptedly up to the half-year ending Christmas 1679. During the 1670s Hobbes usually paid Wheldon £10 per year, a sum that doubled Wheldon's basic wage. The final entry relating to Hobbes shows that, early in 1680, Wheldon paid someone sixpence 'for carrying M. Hobbes's Will to London'.

[7] Hobbes 1994, letter 94, 320.

[8] I have compared the Hereditary Right manuscript with letters written for Hobbes by Wheldon in 1675, 1677, 1678, and 1679. For the letters in question see Hobbes 1994, letter 198, 751–2; letter 200, 756–7; letter 202, 766–7; letter 204, 769.

[9] Aubrey 1898, vol. 1, 352.

[10] Malcolm 1994, xxiii.

[11] Hobbes 1994, letter 155, 558.

1965, 217–18[12] and subsequently in Rogow 1986, Appendix II, 253–4. My present transcription differs from Rogow's at dozens of points, but I have not troubled to record them.

[12] More recently I reprinted the manuscript in Skinner 2002, 34–5.

HISTORICAL INTRODUCTION

To understand the significance of the question put to Hobbes by Cavendish, we first need to know a word more about the latter's political career. Cavendish had sat in the House of Commons as member for Derby throughout the life of the so-called Cavalier Parliament from 1661 to 1679. Having kept this assembly in being for no less than eighteen sessions, Charles II eventually dissolved it in January 1679.[13] When the new Parliament met two months later it was amid concerns not merely about the king's high-handed attitude towards his prerogative, but also about his use of his prerogative powers specifically to seek toleration for his Catholic subjects. By the end of 1678, with the discovery of the alleged Popish Plot, these anxieties increasingly came to focus on the figure of the king's younger brother, James duke of York, a known Catholic and a man of suspected absolutist sympathies.[14]

As soon as the new Parliament assembled the earl of Shaftesbury delivered, on 25 March 1679, an impassioned speech in the House of Lords on the state of the nation, warning that 'Popery and slavery, like two sisters, go hand in hand.'[15] The Scots, he declared, have already seen 'their lives, liberties, and estates subjected to the arbitrary will and pleasure of those that govern'. These developments remind us of the dangers posed by popery in England, and of the far graver risks arising from the fact that so many members of the Court remain imbued with the slavish principles of the Catholic faith. 'We must still be upon our guard', recognizing that 'these men are still in place and authority, who have that influence upon the mind of our excellent prince, that he is not, nor cannot be that to us, that his own nature and goodness incline him to.'[16]

Shaftesbury's supporters in the House of Commons were meanwhile professing similar anxieties about the King's safety and state of mind, and on 11 May 1679 they resolved to consider 'the best ways

[13] Smith 1999, 237.
[14] Knights 1994, 29–31.
[15] Haley 1968, 510. Haley adds that the speech was printed in London and Norwich.
[16] Cobbett and Hansard (eds.) 1807, cols. 1116–17.

and means of preserving the Life of his sacred majesty, and of securing the Protestant Religion, both in the reign of his majesty and his successors'.[17] After a long debate,[18] in which Cavendish spoke immediately after Richard Hampden had moved to exclude the duke of York from the succession, the House resolved 'That a Bill be brought in to disable the Duke of York to inherit the Imperial Crown of this Realm'.[19] The Exclusion Bill duly received its first reading on 15 May 1679 and its second less than a week later.[20]

Faced with this almost treasonous challenge, Charles II reacted by proroguing Parliament on 27 May and dissolving it shortly afterwards.[21] This created a breathing-space in which everyone was able to consider where they stood in relation to these astonishing developments. Cavendish must have felt keenly aware of the need to reflect on his own position. He cannot have failed to see that, as soon as the new Parliament met, the issue of exclusion would again be at the top of the Commons' agenda.[22] Meanwhile his own views about exclusion remained far from settled, as his speech of 11 May had revealed. He had neither opposed nor supported the move to 'disable' the duke, but had merely spoken in a tentative fashion about the possibility of a compromise. He had suggested that 'what is proposed in the king's and chancellor's Speech' might possibly 'go a great way in what you aim at', and had ended by appealing to the House to 'consider therefore the safest ways' before doing anything desperate.[23]

It would not have been surprising if, in such a mood of anxiety and confusion, Cavendish had felt the need in the early summer of 1679 to seek some advice, and it must I think have been at this juncture that he decided to bring Hobbes up to date about the crisis and seek his opinion on it. One piece of evidence pointing in this direction is that a copy of Shaftesbury's speech of 25 March was evidently made for Hobbes's use around this time. Among the items in Hobbes's papers docketed under the year 1679 is a fairly accurate (if somewhat

[17] Cobbett and Hansard (eds.) 1807, col. 1131.

[18] Jones 1961, 65–6; Knights 1994, 49–53.

[19] *Journals* (n. d.). vol. IX, 620.

[20] Ibid., 623, 626.

[21] Jones 1961, 73; Knights 1994, 56.

[22] This duly happened. The new Parliament finally met on 21 October 1680, and by 11 November the House of Commons had already given a third reading to its Exclusion Bill.

[23] Cobbett and Hansard (eds.) 1807, col. 1133.

ill-spelled) transcription endorsed on the back 'The Right hon.[ble] the Earl of Shaftsbury's speech in the House of Lords March 25. 1679'.[24] A second and yet more striking piece of evidence is that Hobbes appears to have been supplied with a copy of the Exclusion Bill itself. A further item docketed in his papers under the year 1679 is an eight-page manuscript endorsed in James Wheldon's hand 'A Copy of the Bill concerning the D: of York'.[25]

The strongest evidence, however, that Cavendish's question must date from the early summer of 1679 is that it closely follows the phraseology of the Commons debate of 11 May and the Exclusion Bill itself. Cavendish begins by asking what should be done if a problem arises with 'a Successour to a Crown'. This echoes the preamble to the Exclusion Bill, which had likewise asked what should be done if the duke of York 'should succeed to the imperial crown'.[26] Cavendish goes on to enquire about the best course of action to follow if a successor is known to be suffering from a 'notorious' incapacity. Here too he echoes the Exclusion Bill, which had opened by declaring that the duke of York 'is notoriously known' to be incapable.[27] The specific weakness Cavendish mentions is that of being 'incapable to protect the people'. This recalls one of the main anxieties expressed in the Commons debate of 11 May, in which several members had spoken of their fears that there would be 'no safety' and 'no probability of security' for the people under the duke of York.[28] Cavendish next asks what should be done 'if the Government should devolve' upon such a prince. Here again he draws upon the language of the Exclusion Bill, which had proposed that in such a case the government should 'devolve to the person next in Succession'.[29] Finally, Cavendish enquires whether, in the case of an incapable successor, the prince in possession is not 'oblig'd to putt him by'. This too recalls the Commons debate of 11 May, in which Edward Boscawen had defended the possibility of 'pretermitting'

[24] Chatsworth Hobbes MS G 2, two conjugate leaves, making four folio pages. The speech covers the first three pages; the final page, except for the endorsement, is blank.

[25] Chatsworth Hobbes MS G 3, four conjugate leaves, making eight folio pages. The Bill covers the first seven pages; the final page, except for the endorsement, is blank.

[26] Browning (ed.) 1966, 113.

[27] Ibid., 113.

[28] Cobbett and Hansard (eds.) 1807, cols. 1132, 1135.

[29] Ibid., col. 1136.

or putting by a 'succeeding prince' in the name of 'securing the government'.[30]

This account of the context in which the Hereditary Right manuscript was produced still leaves us with a puzzle. Why does the manuscript exist at all? Why did Cavendish write out his queries instead of simply talking to Hobbes about them, especially if they were living in the same house? One possibility is that he may have wished to keep a record of Hobbes's answers rather than having to remember them. But perhaps the most likely explanation is that Parliament was still in session when Cavendish decided that he stood in need of some advice. If he was in London, while Hobbes was in Derbyshire, it is hardly surprising that he decided to write. But if the surviving manuscript is Hobbes's reply, how did it come to end up at Chatsworth? One would have expected Hobbes to post it back to Cavendish in London. Perhaps this part of Hobbes's reply was never sent, or perhaps a copy was sent, which might explain why this part of Hobbes's discussion with Cavendish has alone survived. One can only speculate.

Before turning to examine Hobbes's *Answer* (as I shall call it), two further observations need to be made. One is that the manuscript includes several indications (in addition to its pagination) that it originally formed a section of a longer disputation between Cavendish and Hobbes. An initial hint is contained in Cavendish's opening words: 'If you allow that a king does not hold his title by divine Institution . . . ' This appears to refer to a previous argument, in the course of which Hobbes and Cavendish had evidently reached some measure of agreement. Further hints to the same effect can be found in Hobbes's *Answer*. The first appears in his opening words: 'Here agen you mistake me.' This plainly alludes to an earlier dispute, although it is not clear whether Hobbes means that Cavendish is mistaken about other aspects of his theory or merely that he has made other mistakes about this aspect of it. A second hint appears when Hobbes immediately adds 'Nor did I mention the word *Institution*', and a third when he reminds Cavendish in his final paragraph that 'you have not yet answered me to the question, Who shall force him'. These remarks all appear to refer to earlier arguments, and Hobbes seems to be complaining at the end that he still awaits a satisfactory response.

[30] Cobbett and Hansard (eds.) 1807, col. 1135.

If the surviving manuscript originally formed part of a longer disputation, how many questions had Cavendish already put to Hobbes? The appearance of the manuscript suggests that Cavendish's procedure was to take a sheet of foolscap, to fold it across the middle to make four quarto pages, to write his question at the top of the first page, and to leave the rest blank for Wheldon to copy out Hobbes's response. If he adopted the same procedure in the case of the questions he had already asked, then it follows that the section of the discussion that survives—with '9' at the top of the first page—must contain the third of his questions to Hobbes.

My other observation is prompted by the second half of Cavendish's opening sentence. Cavendish writes: 'If you allow that a king does not hold his title by divine Institution, as indeed 'tis absurd to say he does, then I suppose you will admitt that his title to Governe arises from his protecting those that are govern'd.' There are several reasons for finding this a somewhat peculiar remark. For one thing, it embodies a *non sequitur*, and it is perhaps surprising that Hobbes does not pick it up.[31] It is still more surprising that Cavendish asks Hobbes if he 'will admitt' that there is a mutual relation between protection and obedience, as if the acceptance of such a doctrine would represent a concession on Hobbes's part. The proposition that protection gives a title to obedience, while any failure of protection brings the duty of obedience to an end, are among the most emphatic political arguments of *Leviathan*. 'The obligation of subjects to the sovereign', as Hobbes proclaims in chapter XXI, 'is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them.'[32] To which he adds in his Review and Conclusion that he wrote *Leviathan* 'without other design than to set before men's eyes the mutual relation between protection and obedience'.[33] Cavendish's question reveals a remarkable ignorance about one of the central tenets of Hobbes's theory of the state. Perhaps this may even help to account for the somewhat irritable tone in which Hobbes's *Answer* is couched.

There is a further reason for wishing to stress that, according to Hobbes, we are politically obliged if and only if we are protected.

[31] It hardly follows, that is, from the fact that kings do not owe their titles to divine institution that they must owe them to their protective powers.

[32] Hobbes 1839, 208.

[33] Ibid., 713.

Hobbes's *Answer* has recently been interpreted as an attempt to show 'that his theory could be used as a basis for Royalism' and in particular 'that it was not incompatible with ideas of indefeasible hereditary right'.[34] As I have already intimated, however, Hobbes's theory of political obligation is blankly incompatible with any doctrine of indefeasible right. Although the right of an hereditary king to rule can never be annulled by his own subjects, his right to be obeyed can never be indefeasible, simply because his subjects owe obedience if and only if he protects them. Not only is this Hobbes's consistent doctrine in *Leviathan*; it is also his doctrine in the *Answer*. When Cavendish puts it to Hobbes that a king's title to govern 'arises from his protecting those that are govern'd', Hobbes duly agrees that 'I confesse that as the King ought to protect his people so the people ought to obey the King.'

I now turn to Hobbes's *Answer* itself. It is a text of exceptional interest not merely because it invokes and develops some pivotal doctrines about sovereignty in *Leviathan*, but also because it represents Hobbes's last word on politics. It is true that Hobbes's argument is elliptical and confused in places, but there can be little doubt that he was still in full possession of his faculties when he composed it in the early summer of 1679. A few months later, however, he was 'suddainly striken with a dead Palsie which stupified his right side from head to foote, and tooke away his speech, in truth I think his reason and sense too.' These are the words of Justinian Morse, the fourth earl of Devonshire's secretary, who adds that Hobbes died within a week.[35] His death occurred at Hardwick Hall on 4 December 1679, probably less than six months after his *Answer* had been dictated to his ever-faithful amanuensis, James Wheldon.[36]

Hobbes begins: 'I deny not but a King holds his Title by Divine right.' This is a startling claim, and one that was no doubt intended to provoke. Hobbes was a sworn enemy of traditional theories of divine right, according to which kings owe their legitimacy not to the consent of those who become their subjects, but rather to the will and providence of God alone. Hobbes insists at the start of chapter XVIII of *Leviathan* that 'all the *rights*, and *faculties*' of sovereigns are

[34] Burgess 1990, 701. For a critique of the claim that Hobbes can be regarded as a royalist see Hoekstra 2004.

[35] Pritchard 1980, 182, 183–4.

[36] Aubrey 1898, vol. 1, 382–3 contains James Wheldon's own account of Hobbes's final days.

'conferred by the consent of the people assembled'.[37] He returns to the same argument in chapter XXVIII, confirming that 'all sovereign power, is originally given by the consent of every one of the subjects, to the end they should as long as they are obedient, be protected thereby.'[38]

To make sense of Hobbes's opening contention, we need to bear in mind the distinctive way in which he handles the concept of divine right in *Leviathan*. Hobbes uses the actual phrase 'by divine right' only once in the whole work, where he equates this form of rule with government 'by authority immediate from God'.[39] As he elsewhere indicates, however, when he speaks of holding authority 'immediately under God' he simply means that the authority in question is held without intermediaries.[40] 'Christian kings have their civil power from God immediately; and the magistrates under him exercise their several charges in virtue of his commission.' We may therefore say that 'All lawful power is of God, immediately in the Supreme Governor, and mediately in those that have authority under him.'[41] Kings, like everyone else, are subject to God; but the defining characteristic of kings is that, within their own territories, they are subject to no one else. This is the essence of what Hobbes means by saying that they rule by divine right.

Hobbes goes on to mount a contrast between kings and heirs apparent, declaring that the latter never hold their titles by divine right. This seems a somewhat curious remark. Cavendish's question had made no mention of heirs apparent, and had merely spoken of 'a Successour to a Crown'. Hobbes in his final paragraph similarly speaks in general terms about 'the King in possession' and 'his next Heir', eliding any distinction between heirs apparent and heirs presumptive. Furthermore, as Cavendish and Hobbes were both aware, the question of the moment was not about heirs apparent but about heirs presumptive. The Exclusion crisis had arisen in part

[37] Hobbes 1839, 159.

[38] Ibid., 304.

[39] Ibid., 469.

[40] Ibid., 380. Although Hobbes uses the phrase 'by divine right' only once in *Leviathan*, he frequently uses the equivalent Latin phrase *de iure divino*. Whenever he does so, however, he likewise makes it clear that (as he puts it, 540) he is speaking of holding an office 'by immediate authority from God, that is to say, in *God's right*'. For other instances see ibid., 546, 567, 571, 608.

[41] Ibid., 567.

because an heir apparent was precisely what Charles II lacked. It is curious, then, to find Hobbes singling out heirs apparent in this way. It may be, however, that in doing so he was alluding once more to an earlier part of his disputation with Cavendish, in which the status of heirs apparent had already been discussed.

After these preliminaries, Hobbes devotes the rest of his opening paragraph to laying out his views about the rights of kings. He begins by explaining what he means by 'institution', a technical term employed in *Leviathan* to refer to one of the methods of lawfully acquiring a public office, including the office of a king. According to *Leviathan*, an official is 'instituted' when he becomes the authorized representative of someone else.[42] He becomes an authorized representative when he receives a commission or licence to exercise the rights of another person and to act in their name.[43] He is then said to act by their right or authority, for 'by authority, is always understood a right of doing any act; and *done by authority*, done by commission, or licence from him whose right it is.'[44] Hobbes is chiefly interested in how sovereigns come to be instituted as representatives of commonwealths, but in chapter XLII of *Leviathan* he also mentions the case of instituting a constable, the example to which he recurs in his *Answer* to Cavendish.[45]

Hobbes has almost nothing to say in *Leviathan* about the kinds of ceremonies that might attend the act of instituting an official with a public role. He contents himself with observing that it is a matter of granting the official a licence, a commission or a warrant to play the part of a representative.[46] It is thus of particular interest that, in the course of his *Answer*, Hobbes specifically mentions a number of such ceremonies. He now adds that, in the case of a king, the act of institution involves 'Enthroneing, Proclameing, Anointing, Crowning etc.' by way of showing that he has duly been commissioned to represent the commonwealth. Here Hobbes makes a modest but revealing addition to his theory of authorization as outlined in chapter XVI of *Leviathan*.

Cavendish had spoken of those who argue (absurdly, in his view) that kings hold their titles 'by divine Institution'. Hobbes retorts that he has never mentioned the word 'Institution' in the course of their discussion, to which he adds 'nor do I know what you mean'. His

[42] Hobbes 1839, 159. [43] Ibid., 148. [44] Ibid., 148.
[45] Ibid., 567. [46] Ibid., 148, 335.

slightly fretful tone may well reflect some suspicion of Cavendish's precise phraseology. Hobbes is always at pains to insist that there is nothing in the least divine about the act of instituting even a sovereign king. When he speaks in the *Answer* about enthroning, proclaiming, and so on, he goes on to declare 'Which of all humane, and done *Iure Regio*'. This phrase admittedly makes little sense as it stands, but if we assume, as I think we should, that the word 'of' should read 'are', then the meaning becomes clear enough. What Hobbes is telling us about enthroning, proclaiming, and so on is that there is nothing *iure divino* about such acts: they 'are all humane' and nothing more.

It is exactly this analysis of 'institution', drawn in the main from *Leviathan*, that Hobbes deploys in his *Answer* when he proceeds to contrast the case of the constable who acts 'by royal right' with the king who acts 'by divine right'. Hobbes articulates the distinction in Latin, speaking of the constable acting *Iure Regio* and the king acting *Iure Devino* (although the latter phrase should read *Iure Divino*, a slip by James Wheldon—who knew no Latin[47]—which Hobbes fails to correct.) The distinction is used to explain how it comes about that a constable has the right 'to lay hands upon me' for theft, whereas I have no comparable right to lay hands on him. The reason is not that I am a thief. ('He needs not say, because you are a Theefe. For perhaps I might truly say as much of him.') The reason is that the constable is the holder of a recognized public office. He can therefore claim to be acting not merely in his own name—as I would be if I were to lay hands on him—but by licence or commission from the king and hence as his authorized representative. As Hobbes puts it, he can claim to be acting '*Iure Regio* (i.e.)[48] by the right of the King'. If he arrests me, he will be acting not in his own name but (as we still say) in the name of the law.

The significance of this analysis, it next emerges, is that it casts further light on what Hobbes means by saying that kings not only hold their titles by divine right, but are sometimes capable of acting *iure divino* as well. To say that a king has acted by divine right can only mean that he has received a special licence or commission to represent God in some particular way. As Hobbes summarizes in his *Answer*—closely echoing the language of *Leviathan*—'that which is

[47] This is made clear in Hobbes 1994, letter 179, 693.

[48] The manuscript simply reads '(i)', but this was a standard seventeenth-century contraction for 'i.e.'.

said to be done *Iure Devino* in a King is said to be done by Warrant or comission from God; but that I had no commission.'

Hobbes next says something more about the concept of a right underlying the claim that the constable and the king can both be said to possess certain rights of action not possessed by others. He begins with two direct citations from *Leviathan*. First he declares that 'Law and Right differ', a quotation from the start of his discussion of the laws of nature in chapter XIV.[49] Then he proceeds to explicate the first half of the distinction, declaring in a further quotation—this time from the discussion of civil law in chapter XXVI—that 'Law is a command'.[50] It is the second half of the distinction in which Hobbes is principally interested, and it is striking that, as he turns to furnish the required definition of a right, he provides an analysis very different from the one he had previously given in *Leviathan*. There he had informed us (in chapter XIV) that 'RIGHT, consisteth in liberty to do, or to forbear; whereas LAW, determineth, and bindeth to one of them.'[51] But we now find him saying instead that 'Right is a Liberty or priviledge from a Law to some certaine person though it oblige others.'

The reason for the difference, it might seem, is that in chapter XIV of *Leviathan* Hobbes is discussing the concept of a natural right, whereas in the *Answer* he is talking about rights or liberties within civil associations. This is partly correct, but if we turn to his account of civil rights in *Leviathan* we find that here too his analysis differs from that of the *Answer*. In *Leviathan* Hobbes draws a sharp distinction between two types of civil rights. He speaks about the rights or liberties that stem from 'the silence of the law', but he also speaks about what he calls 'the true liberty of a subject'.[52] The latter form of liberty is said to arise because there are various things that, 'though commanded by the sovereign', a subject 'may nevertheless, without injustice, refuse to do'.[53] The key to understanding the range of these rights lies in recognizing that 'every subject has liberty in all those things, the right whereof cannot by covenant be transferred', including the right under all circumstances to defend his own life.[54] In the *Answer*, by contrast, Hobbes maintains that all civil rights are simply freedoms or exemptions from the law allowed 'to some certaine person' while others remain obliged. The implication appears to be

[49] Hobbes 1839, 117. [50] Ibid., 257. [51] Ibid., 117.
[52] Ibid., 203, 206. [53] Ibid., 203. [54] Ibid., 204.

that, although we have rights under the law, and may in addition have exemptions from the law, we have no rights against the law. The category of 'the true liberty of a subject' seems to have been dropped.

Why does Hobbes make no mention in the *Answer* of this further class of rights? Once again, one can only speculate. Perhaps the omission was an act of sheer inadvertence. Or perhaps it seemed unnecessary to introduce this extra complication into such a brief response. But perhaps the revision of his earlier theory was deliberate. A number of critics had taken particular exception to his claim that, as Sir Robert Filmer had expressed it, 'right of defending life and means of living can never be abandoned'.[55] Filmer had retorted in his *Observations* that such a doctrine is 'destructive to all government whatsoever, and even to the *Leviathan* itself'.[56] It is possible that Hobbes had come to agree with him.

The first paragraph of the *Answer* ends by contending that, although kings hold their titles by divine right, and are sometimes capable of acting by warrant or commission from God, 'tis not so of Heirs apparent'. Why not? If we turn to Hobbes's final paragraph, we learn that the 'next Heir' of a king will always owe his title to the king himself, who has the right to decide who shall succeed him. But in the present passage Hobbes instead offers an oddly elliptical explanation based on comparing the position of an heir apparent with that of God. One difference is said to be that 'God is no Heir to any King'. A further difference is said to be that, by contrast with human sovereigns, God does not have 'any inheritance to give away'.

Hobbes's line of reasoning seems to falter at this point. His first observation (that 'God is no Heir to any King') is not what Wheldon initially wrote. Hobbes has cancelled his original words in such a way as to render them illegible, and has rewritten them in such a way as to leave them without any clear sense. Perhaps the most plausible reading of the passage is that Hobbes is already gesturing towards his basic doctrine that it is entirely for kings in possession to decide who shall be their heirs. No title to succeed can ever be acquired *iure divino*, since the right of succession will always be determined *iure regio*. The reference to God is evidently intended to reinforce this argument. Unlike kings, God does not acquire His title from anyone, nor does He pass it on to anyone else. The inheritance of titles has nothing to do with God.

[55] Filmer 1991, 195. [56] Ibid., 195.

I turn to Hobbes's second paragraph, in which he presents another oddly elliptical argument. He seems to be saying that the reason why people ought to obey their kings, just as kings ought to protect their people, is because it is impossible for kings to offer protection unless they are given as much money as they judge necessary for the task. Perhaps the missing line of thought here is that people ought to obey their kings *when their kings ask for money to protect them*. This would certainly have been a topical observation, since the House of Commons in the Exclusion crisis sought to withhold supply from the Crown until it received assurances about the succession. The suggestion is a purely speculative one, but it seems the only way to make sense of the paragraph, especially as Cavendish had said nothing about taxation when asking about the rights of subjects.

It is worth underlining the emphasis Hobbes places on the impossibility of a king's protecting his subjects unless they furnish him 'with so much money as he shall judge sufficient to doe it'. One of the principal aims of the parliamentary opposition in the opening decades of the seventeenth century had been to establish that no taxes or impositions can lawfully be levied without the explicit consent of both Houses of Parliament. They had sought to establish, in other words, that it is for Parliament to exercise the final judgement on how much money is sufficient for the king to protect his subjects. Hobbes, by contrast, never ceases to insist that the covenant by which the members of a multitude agree to institute a sovereign requires them 'to submit their wills, every one to his will, and their judgments, to his judgment'.[57] When Hobbes refers in his *Answer* to the right of sovereigns to judge how much money they require, he is restating in its simplest terms one of the cardinal features of his theory of sovereignty.

I turn finally to Hobbes's concluding paragraph, in which he directly addresses the question of whether (as he phrases it) 'the King in Possession be not obliged to put by his next Heir in case of notorious incapacity'.[58] Hobbes had already asked himself in chapter XIX of *Leviathan* how the succession can best be managed under a monarchy. In his earlier analysis, however, he had not considered the

[57] Hobbes 1839, 158.

[58] In fact Cavendish had written not 'the King in possession' but 'the Prince in possession'.

case in which Cavendish is specifically interested, that of a ruler who has an 'incapable' heir upon whom the rights of sovereignty may perhaps descend. Hobbes had previously limited himself to considering the case in which a sovereign's authority has in fact descended upon an incapable heir who 'cannot discern between good and evil'.[59] Part of the interest of Cavendish's question is thus that it calls on Hobbes to say something more about this aspect of his theory of kingship.

Hobbes responds by considering three different possibilities. If the incapacity 'proceed from want of money', he begins, there are no grounds at all for the heir to be set aside. This is because, as Hobbes has already made clear, such shortage of money can only result from a failure on the part of the king's subjects to observe the terms of their covenant. The implication appears to be that it is for them to change their attitude, not for the king to penalize his heir.

Hobbes next considers the case in which the incapacity arises not from lack of funds but 'from want of naturall reason'. This may give grounds for exclusion, he seems to imply, but not of such a kind as to make the king 'obliged thereunto'. Hobbes appears to regard this as obvious, and he leaves it at that, merely adding that 'I will speake of that subject no more till we have such a weak King.' This refusal to engage with the issue strikes a characteristically cautious note, but it may also embody a humorous allusion—of a kind that Hobbes liked to make[60]—to his own extreme old age. To say (at the age of ninety-one) that he will not speak about the subject until a weak king comes to power is perhaps a rueful way of saying that he will never speak about it at all.

Why does Hobbes think it obvious that a king in possession cannot be obliged to settle the succession in any particular way? He offers no reason in his *Answer*, but if we return to chapter XIX of *Leviathan* we find the explanation unequivocally laid out:

> There is no perfect form of government, where the disposing of the succession is not in the present sovereign. For if it be in any other particular man, or private assembly, it is in a person subject, and may be assumed by the sovereign at his pleasure; and consequently the right is in himself. And

[59] Hobbes 1839, 176.

[60] For an earlier example see ibid., 712.

if it be in no particular man, but left to a new choice; then is the commonwealth dissolved.[61]

As Hobbes never tires of reminding us, by the terms of our covenant we assign complete discretion to our sovereigns to act as they judge best for our peace and defence. To say of a sovereign that he lacks authority to settle his own succession is thus to say that he is not a sovereign at all.

Hobbes's third and principal observation relates to the predicament in which, as he phrases it, 'the King in possession may lawfully disinherit his diseased Heir and will not'. Hobbes begins by complaining—in a reference to a missing part of his discussion with Cavendish—that 'you have not yet answered me to the question, Who shall force him'. Hobbes clearly believes that no king in possession can lawfully be forced to 'put by' his heir, but the reason he gives for this conclusion is very hard to follow. 'I suppose', he writes, 'the sound King living cannot be lawfully deposed by any person or persons that are his Subjects; because the King dying is *ipso facto* dissolved; and then the people is a Multitude of lawlesse men relapsed into a condition of warr.'

This passage forcibly suggests that Hobbes's procedure in composing his *Answer* must have been to dictate a draft to Wheldon, who then worked it up into the fair copy that survives, but without always managing to reproduce Hobbes's somewhat telegraphic thought-processes. Certainly Hobbes's argument at this juncture is so condensed as to be barely intelligible. What is supposed to be the connection—or distinction—between the death and the dissolution of a king? The *Answer* provides no clue, but we can perhaps clarify the passage if we return once more to chapter XIX of *Leviathan*. There Hobbes remarks that, if a ruler has 'no power to elect his successor', and if no one else has that power, then our predicament will be such that, if the king dies, 'the commonwealth dieth, and dissolveth with him', thereby returning us to a state of war.[62] It is possible that the *Answer* is drawing on a similar line of thought and applying it to the case in hand. If so, Hobbes's argument can perhaps be reconstructed somewhat as follows. If a sound king is living, then his heir cannot lawfully be deposed by any person or persons that are

[61] Hobbes 1839, 180. [62] Ibid., 178.

subjects of the sound king.[63] The reason is that, if this is done and the sound king then dies, the commonwealth will *ipso facto* be dissolved, at which point the people will revert to being a multitude of lawless men relapsed into a condition of war.

The fact that Hobbes stops short after considering only these three possibilities makes his answer to Cavendish a deeply evasive one. As we have seen, he was well aware that the great question of the hour was whether an heir whose religion differs from that of his prospective subjects can be said to be suffering from an incapacity sufficiently serious to justify his exclusion from the throne. But on this key issue Hobbes has nothing to say at all.

The general tenor of Hobbes's argument, however, leaves little doubt as to what he would have answered if pressed. He is clear that, even if an heir is so diseased as to be lacking in any natural reason, he still cannot be excluded. Such an act will always carry with it the danger of dissolving the commonwealth, and to dissolve a commonwealth is, in Hobbes's unwavering judgement, the most self-destructive act that can possibly be performed. This is one of the leading themes of chapter XIX of *Leviathan*. If the succession 'be in no particular man, but left to a new choice; then is the commonwealth dissolved; and the right is in him that can get it.'[64] But this will bring 'a return to confusion, and to the condition of a war of every man against every man', and hence an outcome 'contrary to the intention of them that did institute the commonwealth'.[65] Hobbes may even have had this passage open in front of him when dictating the closing words of his *Answer*, for essentially he ends by repeating what he had earlier said: 'and then the people is a Multitude of lawlesse men relapsed into a condition of warr of every man against every man. Which by making a King they intended to avoid.'

Did Hobbes's *Answer* have any influence on Cavendish? When the new Parliament assembled on 7 October 1679, Charles II instantly prorogued it, and it did not meet until 21 October 1680.[66] The king's

[63] It may seem strange that, in speaking of the removal of a mere heir, Hobbes uses the term 'depose', since the current sense of the word makes it nearly synonymous with 'dethrone'. As the OED confirms, however, in early-modern English the word was often used to refer more generally to the act of 'putting down' anyone from any 'position or estate'.

[64] Hobbes 1839, 180.

[65] Ibid., 180, 182.

[66] *Journals* (n. d.). vol. IX, 635–6; cf. Smith 1999, 237.

prevarications were of no avail, however, for the House of Commons immediately reintroduced its Exclusion Bill, which it sent up on 15 November to the House of Lords.[67] The Lords unceremoniously threw it out, but the Commons refused to be put off. They resolved after a long debate on 15 December to bring in a further Bill 'for preventing the Duke of Yorke, or any Papist, from succeeding to the Crown'.[68] When the king refused even to consider such a proposition, the Commons engaged in a further debate on 7 January and concluded once more that the only way to settle the succession would be by 'disabling' the duke.[69]

Cavendish contributed to both these debates, and his speeches show that he had shifted a considerable distance from his uncertain middle position of March 1679. But he had moved in a direction that Hobbes would not at all have liked. Cavendish now announces with complete assurance that, as he puts it in his speech of 15 December, 'there can be no other way to secure the Protestant Religion' than by a Bill to exclude the duke of York.[70] His speech of 7 January underscores the same commitment. 'I am fully persuaded, that we cannot be secure, neither of our religion nor peace and quietness, without this Bill' and that 'neither the king's person, nor Protestant religion can be secured any other way.'[71]

The debate of January 1681 prompted an instant dissolution, and a new Parliament was summoned to meet on 21 March in the more congenial setting of Oxford. Cavendish was again elected as member for Derby, and spoke briefly on a minor matter on 25 March.[72] But he remained silent throughout the long discussion of Exclusion to which the Commons almost immediately returned, a discussion that led Charles II to dissolve Parliament at once and never to summon it again.[73]

[67] Cobbett and Hansard (eds.) 1807, col. 1215.

[68] *Journals* (n. d.). vol. IX, 680.

[69] Cobbett and Hansard (eds.) 1807, col. 1293.

[70] Ibid., col. 1235. Knights 1994, 124 states that, according to the French ambassador (who paid MPs for his information), Cavendish had become 'converted' to the cause of Exclusion by the summer of 1680.

[71] Cobbett and Hansard (eds.) 1807, col. 1282.

[72] Ibid., col. 1317.

[73] For the preliminary discussion of Exclusion see ibid., cols. 1317–32. Parliament was hurriedly dissolved on 28 March. See ibid., col.1337 and cf. Smith 1999, 237.

This is not to say, however, that Cavendish made no contribution to this final act in the exclusion drama, for he seems to have been the author of the anonymous tract entitled *Reasons for His Majesties Passing the Bill of Exclusion*,[74] which was first published shortly before the opening of the Oxford Parliament.[75] Cavendish again announces himself unambiguously in favour of the Exclusion Bill, but he now emphasizes his disapproval of the factious way in which the Crown's critics have been attempting to impose it. He proposes that in the new Parliament an attempt should instead be made to persuade the king that his acceptance of such a Bill would not only be just but in his own best interests.

By way of supporting the justice of the Bill, Cavendish begins by reverting to one of the conclusions on which he and Hobbes had agreed nearly two years before. 'It seems to me to be an undeniable Position, that Government is intended for the safety and protection of those that are Govern'd.'[76] He then goes on to invoke the authority of Hobbes himself:

> For admit, according to Mr. *Hobbes*, that Monarchical Government is form'd by an Agreement of a Society of Men, to devolve all their power and interest upon one Man, and to make him Judge of all Differences that shall arise among them; 'tis plain, that this can be for no other end, than the Security and protection of those that enter into such a Contract'.[77]

These are indeed Hobbesian premisses,[78] and Cavendish may even have encountered them in one of the missing parts of his disputation with Hobbes. But Cavendish proceeds to draw from them an inference which, it is safe to say, would have left Hobbes horrified. What kind of people, Cavendish rhetorically asks, 'can be suppos'd to have been so void of sense, and so servilely inclin'd, as to give up their Lives and Liberties to the unbounded disposal of one man, without imposing the least condition upon him?' To make such a decision, he

[74] For the attribution of the tract to Cavendish see Wing 1945–51, vol. 1, 444.

[75] [Cavendish] 1681, 2 speaks of 'the Parliament which is to meet at *Oxford*', while the title-page of his tract gives its date of publication as 1681. The Parliament of 1680–1 was dissolved on 18 January 1681 and the Oxford Parliament met on 21 March 1681. See Smith 1999, 237. Cavendish's tract must therefore have been published between late January and early March 1681.

[76] [Cavendish] 1681, 2.

[77] Ibid., 2.

[78] With the crucial exception that, according to Hobbes, the agreement is made not by a society of men but by the individual members of a multitude.

goes on, would be so improbable that ''Tis hard therefore to conceive, that Absolute Monarchy could ever have been constituted by consent of any Society of Men'.[79]

Cavendish's conclusion is diametrically opposed to that of Hobbes in *Leviathan*. Hobbes maintains that the political covenant arises out of our recognition that we have no alternative but to make an unconditional conferment of all our power and strength upon one man or Assembly of men.[80] He accordingly treats it as wholly rational to consent to the establishment of an absolute monarchy in the name of promoting our security and peace.[81] Cavendish's argument not only shows that by this time he had become a Whig (albeit an extremely cautious one) but that he was quixotic enough to believe that Hobbes's authority could be recruited in support of the Whig cause. If Hobbes had not died a year earlier, this would surely have been enough to kill him off.

There was one moment in the Exclusion crisis, however, at which Cavendish's reflections on his own position led him to a conclusion that Hobbes would not only have endorsed, but had actually put forward in his *Answer*. When Cavendish delivered his two speeches in the Parliament of 1680–1, he acknowledged on both occasions that the king cannot be forced. Working with this assumption, his final recommendation to the Commons was therefore that any attempt to pass an Exclusion Bill ought to be given up.

Cavendish's complete failure to win the Commons round to this viewpoint may help to account for his silence in the Oxford Parliament, but in earlier debates we find him expressing this commitment with considerable emphasis. As he declared in his speech of 15 December 1680, 'seeing that, according to the course of parliaments, we are not like to bring this to a trial for a long time, I am of opinion, we had best try something else.'[82] Returning to the issue in the crucial debate of 7 January 1681, he reiterated his previous argument. Although an Exclusion Bill is undoubtedly necessary, 'we are not like to have it at this time'. We should therefore abandon the struggle and concentrate instead on 'those other bills that are afoot, that we may try if we can get them'.[83] With these sentiments, at least, Hobbes would surely have agreed.

[79] [Cavendish] 1681, 2. [80] Hobbes 1839, 157–8. [81] Ibid., 172.
[82] Cobbett and Hansard (eds.) 1807, col. 1236.
[83] Ibid., col. 1282.

If you allow that a king does not hold his title by divine Institution, as indeed 'tis absurd to say he does, then I suppose you will admitt that his title to Governe arises from his protecting those that are govern'd. My next Question therefore is this, If a Successour to a Crown, be for Some reason or other which is notorious, incapable to protect the people, if the Government should devolve upon him, is not the Prince in possession oblig'd to putt him by, upon the request of his subiects?

Here agen you mistake me. I deny not but a King holds his Title by Divine right. But I deny that any Heir apparent does so. Nor did I mention the word *Institution*; nor do I know what you mean. But I will shew you what I mean by Example. If a Constable lay hands upon me for misdemeanor, I aske him by what right he meddles with me more then I with him. He will answer me, *Iure Regio* (i) by the right of the King. He needs not say, because you are a Theefe. For perhaps I might truly say as much of him. Therefore that which is said to be done *Iure Devino* in a King is said to be done by Warrant or comission from God; but that I had no commission. Law and Right differ. Law is a command. But Right is a Liberty or priviledge from a Law to some certaine person though it oblige others. Institution is no more but Enthroneing, Proclameing, Anointing, Crowning etc. Which of all humane, and done *Iure Regio*. But tis not so of Heirs apparent. For God [*one word deleted*] is [*in different hand*] no Heir [*three words deleted*] to any King. Nor has any inheritance to give away.

You say the Right of a King depends upon his protecting of the people. I confesse that as the King ought to protect [*two words deleted*] his people so the people ought to obey the King. For it is impossible for the best King in the world to protect his people, except his Subjects furnish him with so much money as he shall judge sufficient to doe it.

To your next question, whether the King in Possession [*one word deleted*] be not obliged to put by his next Heir in case of notorious incapacity to protect them. I answer that if the incapacity proceed from want of money, I see no reason, though he can, why he should

do it. But if it proceed from want of naturall reason the King in possession may do it, but is not obliged thereunto. Therefore I will speake of that subject no more till we have such a weak King. But in case the King in possession may lawfully disinherit his diseased Heir and will not; you have not yet answered me to the question, Who shall force him for I suppose the sound King living cannot be lawfully deposed by any person or persons that are his Subjects; because the King dying is *ipso facto* dissolved; and then the people is a Multitude of lawlesse men relapsed into a condition of warr of every man against every man. Which by making a King [*one word deleted* > they *in different hand*] intended to avoid.

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INDEX

abbeys, *see* monasteries
abjuration, 1, 30
Absalom, 118
acts of parliament, *see* statutes
Admiralty, xxx, 19, 55–7, 106–7, 110, 132
advice, *see* counsel
advocates, *see* pleaders
Alexander the Great, 16, 93
Alexander III, Pope, liv
Alexandria, 96
allodium, 141
Anabaptists, xlvii, 97, 101
anarchy, 138
Anthropomorphites, 97
Antony, Mark 133
apostasy, 97
appeal, 39, 41 *see also* writ of error
appetite, 12
aristocracy, 138
Aristotle, 5–6, 13, 34 n.100, 93–5, 133
Arius, 96–7, *see also* Legate
arson, 82, 89–90, 121
Art of Rhetorick, lxvii–viii
Assyria, 138
atheism, bill against, lii
Athens, 14, 40, 133
attainder, 129
attaint, 50, 52
attorneys, 48
Aubrey, John xvi, xvii–xx, xxix, l–li, lxii, lxvi, 6 n.8
authority:
  general 35, 42, 63, 133
  specifically legislative xxxvii, lxii, 10–11, 29, 115, 118
Baanah, 118
Bacon, Sir Francis xvii–xix, xxix
bail, xx
barons, 43, 47, 146
Berkenhead, Sir John liii
Bible, 12, 19, 25, 33, 118
Biblical texts:
  Acts i 18, 118
  Esther ii 22, 118
  Exodus xxii 1, 33
  I Kings ii 28, 118
  Psalms cix 9–10, 118
  Romans vii 7, 29
  II Samuel iv 12, 118
  II Samuel xii 1–6, 33, 115
  II Samuel xviii 14, 118
  II Samuel xx 22, 118
Bichri, 1, 18
Bithan, 118
bishops:
  enmity to Hobbes, xviii, xix n.14, xlviii–lii
  as equitable judges, xxxiii, 66–7, 86
  jurisdiction over heresy, xlvi–lii 99–100, 103, 119–20
  mentioned, 27, 94, 144, 146
bishoprics, 104–5, 109
Blackburne, Richard 6 n.8
blasphemy, lviii
Blount, Charles xvi
Blount, Thomas lxxi
Boscawan, Edward 161–2
Bracton lix, lxx, 36, 45 n.143, 48–9, 88
  on criminal law 43–4, 73, 80, 84
  on kingship 35–6
  definition of law 29
Bridgman, Sir Orlando xl, xli n.111

Buckingham, George Villiers, 1st Duke 113 n.375
burglary 82, 89–90, 121
burning xxv, xlviii, l, lvi, lix, 42, 96–7, 101, *see also* arson
Bushel's case 31 n.87

Cade, Jack 62–3
Caesar, Julius 40, 133
Cambridge University lii–iii
Canaan 136
Canaanites 135
canon law xxx, lx, 19–20, 26, 101, 103, 109, 115
  force of in England xxx, 19–20, 26, 115
  imposes no corporal pains 101, 103
  pardons in lx
Canute, King 81
capital crimes xxiv–v, 68–91 *see also* felony; heresy; treason
Catholics xviii
Caudrey's case 27 n.78
Cavendish family lii
Cavendish, William, 3rd Earl of Devonshire xxvi n.34, 155, 156
Cavendish, William, 4th Earl and 1st Duke of Devonshire
  cites Hobbes on:
    political covenant 175
    divine right 163–4, 166–7
  Exclusion bill:
    speaks in debates on, 156, 174, 176
    first view of, 160
    later view of, 174 and n., 175–6
  heirs, views on exclusion of, 161–2, 171–3, 177
  MP for Derby, 156, 159, 174
  on protection and obedience, 163, 175–6, 177
  questions Hobbes on hereditary right, 155, 160–2, 177
  Reasons for His Majesties Passing the Bill of Exclusion (1681), 175 and n.
ceremonial law 33
Chancellor, Lord xxiv, xxxiii–v, 27, 46, 57–62, 66–7 *see also* Lord Keeper
chance-medley 82, 121, 125
Chancery, equitable side of, *see also* conscience; equity
  character of xxxiii–v
  as court of appeal xxiv, 51–3, 57–62, 65–8, 107
  and juries 110
  mentioned xlvi, 43, 47, 63
Charles I lxiii, 15 n.36, 21, 39, 112
Charles II xviii, xix n.14, lxiii, 17, 39, 159–60, 173
  and Cavalier parliament 159
  and Oxford parliament 174–6
Chatsworth, lii, 155–6, 162, *see also* Hobbes, Thomas, Works: 'Chatsworth manuscript'
Cheapside, 84
childhood, 32
church courts, *see* ecclesiastical courts
Cicero, xxxi, 6 n.4
civil law, *see* Roman law; positive law
civil war 58, 70
civil wars, English xiv, xxvii, 15, 22–4, 134, 137
Clarendon, Edward Hyde, Earl of lxi
  Brief view lxiii
clergy, benefit of 83
Cocquany 24
Coke, Sir Edward
  career
    as Attorney General 132, 134
    as Chief Justice 49
    quarrel with Ellesmere, xxxiv–v, 107 n.353
  views on:
    conquest 136

crime 111
custom 116
declarative statutes 27
equity xxiii, xxxiv–v, 9, 61, 68
heresy lvii, lxi–ii, 99–103, 111
juries 31 n.87
law and right 34–5
maxims 31–2
parliamentary history 144
reason xxxiii–iv, xxxi–iv, xxxix–xl, 8–11, 18–19, 30c, 61, 65, 68
royal power 54, 56, 118, 126
Works:
Institutes of (general references), xxiii, lxx, 19, 63, 90, 132
First institutes xxiii, xxxiv, xliii, 8–9, 18, 37
quoted in *Lev.*, xxxix–xl
on felony 82
on innocent fugitive xliii, 126
Second institutes xxiv, xxxi, 29, 31, 46, 80, 134
Third institutes, xxiv–v, xxvi, lvii, lix, lx, lxi, 90
crime not defined by 111
on felonies 78–90
on heresy xlviii, lvii, lxi–ii, 99–103, 111
praemunire 107–11
on self-defence, 121–5
on treason 68–77
Fourth institutes xxiv, xxvi, xxxiv
on Admiralty, 55–7
on Chancery 57–68
on Common Pleas, 43–7, 49–51
on King's Bench 44–9, 54
Saxon history 143, 146
Reports of, xxiii
Twelfth reports, xlviii
colonies 136
command xxxvi, xl, 29, 31, 33, 72
from God 135
common law, *see* custom; divine law; equity; reason; jury trial
Common Pleas xxvi, 43–7, 49, 51, 53–5, 68
Commons, House of lii, lviii, 10, 143, 146
Compendium of logick and rhetorick lxvii
concealers 48
confession 75, 112
conquest 14–16, 23, 29, 136, 140, 145
conscience:
court of xxxiii–iv, 51–2
individual 23, 66
the sovereign's xxiv, 22, 129
consent, popular xxx, 29, 40, 55, 165
Constantine 96
contracts, xix, xxxiii
convocation, xlvi, xlviii–ix, 108
Cony, George 22 n.65
Cosin, Richard xlviii n.139
council, privy, *see* privy council
councils, general, xlix, lvi, 96–7, 99–101
counsel, xix, 21, 26, 135
courts, xxiii–iv, *see also* Admiralty, Chancery, Common Pleas, Ecclesiastical courts, Exchequer, Exchequer Chamber, High Commission, King's Bench
Corpus Christi College, Cambridge lii
Creed, *see* Nicene Creed
crime (in relation to sin), xlii, 41–2
crimes, capital xxiii–v, 68–91
Croke, Justice 120 n.399
Cromwell, Oliver 22
Crooke, Andrew lxvii
Crooke, William xv, xvi, xx, xxii, xxiii, xxv, li n.153, lxvi–ix
Preface by, lvi–viii, 5–6
Cropsey, Joseph lxxi
custom:
of burning heretics liv–v, 102

custom: (*cont.*)
common law as xxvii, xxix–xxxi, xli
common law distinguished from 116
of jury trial 59
local 19
mentioned 5, 54, 57, 59–60, 107
origins in royal judgement 116
and punishments 113, 116–18
and reason xxxix, 63–4, 116–18, 124
tacit royal assent to xxxvi, xxxix, 116, 120

David, King 114–15
Davies, Sir John xxxi, 75
debt, writ of 59
de excommunicato capiendo xlix, lvii–viii
de heretico comburendo xlvi–vii, xlix, lii, lvii, 102, 103 n.334, 119–20
democracy 138
deterrence xliii, xlv
detinue, writ of 59
Devil, the 91
Devonshire, Earls of, *see* Cavendish
Discourse upon exposicion of statutes xxvii–viii
dispensation, xx
dissenters, *see* noncomformists
distributive law, xlv, 33 n.98
divine law:
common law as 25
equity as xxxii, 10, 66
and good intentions 135
reason as 14
Pope claims right from 29
Doctor and Student, *see* St German
Doddridge, Sir John xxviii–ix, xxxi
Dudley, Edmund 112
Dutch War, First 21
Dutch War, Third xviii

ecclesiastical courts xxx, lx, 43, 104, 107–10
Edgar, King 57
Edmund, King 57
Edward the Confessor 25 n.72, 57
Edward I 44
Edward II 37, 112
Edward III 24, 104
Edward VI xxiv, xlvii, xlix, lxii, 100, 102
Egypt 138
elections 144
Elements of common laws, see Bacon, Sir Francis
Elizabeth I, xlvii–viii, liv, lxii, 20, 42, 99, 102–4, 112
potential use of treason law against, lv, 99b
Ellesmere, Thomas Egerton, Viscount xxxiv–v, 107n. 353
Empson, Sir Richard 112
Epicureans 93–4
Epicurus 93
equity xxxii–li
courts and judges bound by 59, 62–3
and artificial reason, xxiii, xxiv–v, 9, 61, 68
bishops fitted for 66–7, 86
courts of, xxiv, 43, 63, 106, *see also* Chancery
distinguished from:
law 30
justice 30, 68
identified with
common law xxxii–iv, 25, 31, 60–1, 64, 106
eternal divine law 10, 25
law of reason, 31, 61
unwritten law, xxiii, xxxiii, xxxv–ix, xlii
ignorance of, in own causes 48
and juries 30
king's role in xxxiv, 59
precedents in xxxvii–xli, 48

rule in xliv, 127
St German on xx
and Saxon laws 140
see also Chancery; statute, equity of
enemies 21, 72–3, *see also* hostility
eternal law, xxxii, 10, 63, 114
Etheldred, King 57
Eutiches 97
Exchequer Chamber, court of, 53
Exchequer, court of, 43, 45, 46, 53, 61, 63
Exclusion bill (1679) 160 and n.
debated 160–1
Hobbes's copy of 161 and n.
reintroduced (1680) 174
excommunication liv, 104, 108
excuses xlii
exigents 105

families 135, 138, 140
Fage, Robert lxvii
favourites 15, 24, 112
fee simple xx
felo de se, *see* suicide
felony xxv, xliii–iv, lx, 39, 59, 78–90
etymology, 78–9
pardon for 131–2
punishment for 119–25
Fenner, Dudley lxvii
Filmer, Sir Robert 168
Finch, Henry xxix
Finch, Sir Heneage xl
Fitzherbert, Sir Anthony xlvi, lix, lxii, 43–4, 102, 120
Fleetwood, William xxviii n.40
Flemming, Chief Justice 120 n.399
Fleta 37
Fortescue, Sir John 55 n.180
Foxe, John xlvi, xlviii, lvii
France 104, 117, 138, 142
Franks 79
Frederick Barbarossa 97
Fuffetius, Mettus 117
Fuller, Thomas xlviii

gaol-delivery 44
Garnet, Henry 75
Gauls 79, 146 n.478
Germans 139–40
government, origins of 134
Great Seal, 20, 27, 31, 57, 59, 69, 76–7, 115, 139
Greeks, 79, 92
Grey, Lady Jane 140 n.464

Hale, Sir Mathew xvii–xix, xl–xli, lxvi, 107 n.353
'Reflections' by xviii, xxiii n.26, 24 n.69
Hammond, *see* Hamont
Hamont, Matthew lxii, 100
Hampden, Richard 160
hanging xxv, 120
Hardwick Hall lxxi
Hatton, Charles xvi
Hebron, Pool of 118
Henri IV 118 n.391
Henry II 79
Henry III 44, 78–9, 112
Henry V, 24
Henry VI 75, 112
Henry VII 112
Henry VIII, xxxiii, 66, 112
heresy, xv, xxiii–v, xlv–lxii, 42, 74, 91–103, *see* also, Hobbes, *Historical narration*
defined, 92–5
origin of word 92–3
High Commission, xl, liv, lvi, 27, 99–101, 103
Hobbes, Thomas, biographical information:
death of, lxvii, 164
and Exclusion crisis, 160–1

Hobbes, Thomas, biographical information: (*cont.*)
fear of heresy charge xv, xxiv–v, xlix–lxii
interest in law xv, xviii–xx
use of amanuensis, xx n.21, lxix, 156, 157 and n.
see also Hereditary right, Hobbes's manuscript on; *Leviathan*
Hobbes, Thomas, Works:
Apology, li
Behemoth xvi, xviii, xix n.14, lxii–v, lxvi–vii, 5 n.1, 156, 157 and n.
on conquest 25 n.72
date of lxxii–v
Briefe of the Art of Rhetorique xxii, xxx n. 84, lxvi–viii, 5
'Chatsworth manuscript' liv, lvi–vii
compilations:
Moral and political works lxx
Supplement to works xvi
Tracts of Thomas Hobb's xxii, lxviii
Works edited by Molesworth, lxx
De cive xxxvii
Elements of law xiv, xxxv, xlv, 5
Hereditary Right manuscript
appearance 155–6
date 155, 160–2
on dissolution of commonwealths 172–3, 178
divine right 164, 165 and n., 167–8, 169–70, 177–8
heirs apparent and presumptive 165–6, 169–70, 177
heirs, exclusion of 170–3, 177–8
institution of kings 166, 177
protection and obedience 163, 164, 177
representatives 167, 177
right 168–9, 177
royal revenues 170, 177
tone of 163, 167
relationship with *Lev.*'s teachings on:
consent 165
dissolution of commonwealths 172–3
divine right 164, 165 and n.
institution of kings 166
liberty of subjects 168–9
political covenants 170, 172, 176
protection and obedience 163, 164
representatives 166
rights 168–9
succession 171–2
Historia ecclesiastica l
Historical narration xvi, lii, liv, lvi–viii, lxi
Latin Leviathan liv, lviii, lxii
Leviathan xiv, xxxvii–viii, liii
condemned in parliament lii, viii
on punishments lx
on conquest 25 n.72
see entries under Hobbes, works, Hereditary Right
Seven philosophical problems li
Holinshed, Raphael 102
Homage 71–2, 142
Homer, 79, 133
honour, 29
Horne, 'Mr', xvi, lxvi
hostility, xliii, xlv, 69–73, *see also* nature, state of
Hull 137

impotence 89
indexes xxxiii, 11
indictment 38, 55, 72–3
Indulgence, Declaration of xviii, lxiii n.206
informers 48
iniquity, 30, 79, 136 *see also* sin
Inns of Court xxvii

intention, legislative xxxix, 64–6
Ireland 16, 21

James VI and I xxxiii–iv, xlviii, lxii, 51, 66, 75, 100, 113
Jesus Christ 26, 115
Joab 118
Joshua 135–6
Judaism xlvi, lvii, 97
Judas 118
judges:
  and Coke's *Institutes* xxxi–ii
  contests over business 53, 64
  and crimes (as opposed to sins) 42
  as *de facto* legislators xxii, xxvii–viii, lxi–ii, 19, 48, 56, 83, 116
  and development of law xxvi–ix, xxxi–ii, xxvii–xxx, lxi–ii, 48, 56, 83, 116
  of equity xxxviii, 31, 48, 59
  incapacity to:
    appoint punishment 91
    define felony 82
    judge heresy 119
  and king 26, 31, 44, 125, 130
  as licensers xvii, lxvi
  and precedent xxvii, xxxviii–ix, lxii, 48, 56, 83, 116
  qualities needed by 11, 65–7, 83, *see also* bishops
jury trial
  role of 30–1, 56, 76, 90, 111, 124
  as mark of common law 30, 55–7, 61–2, 106, 109–10, 132
  mentioned 52, 86, 126
justice xxxiii, xliv, 29, 36–7
  defined 13–14, 33–4
  distinguished from equity 30, 68
  in men and actions 33–4
  inseparable from Crown 36–7
  James on xxxiv
  synonymous with equity xliv
Justinian 15

Kelyng, Sir John xxxv
Kennett, White lii n.155
king, *see* sovereign power
King's Bench xxvi, 43–7, 49–51, 54–5, 59, 63
  office of Chief Justice 45–6, 49

Lambarde, William 78, 80, 143, 146
Lambeth 106
larceny 82, 88, 131
Laud, William 112
Law:
  defined 29–31, 33
  distinguished from 'right' 34–5
  see also canon law, ceremonial law, civil law, custom, divine law, distributive law, equity, eternal law, law reform, legal profession, natural law, positive law, statute, vindicative law
law reform xix, xxix
legal profession, *see* pleaders, judges
Legate, Bartholomew xlviii, lvii, lix, 100–2, 119, 120 n.399
legislation, *see* intention; statutes
licensing xvi n.6, xvii, lxvi
Littleton, Sir Thomas xxiii, 8, 88
Locke, John xvii–xviii
Lollards xlvi, liv–v, lvii, 98
London xlvi, lii, 43, 47, *see also* Tower
Lord Keeper 57, 66 n.217
Love, Harold xvi n.5
Lucian 94

Macedon 138
Magna Charta, *see* Statutes
Manicheanism 97
manslaughter 82, 123
marriages 140
Marseilles 79
martial law 72–3
Mary I xlvii, lv–vi, lix, 26, 42
mathematics 8

Maxey, Thomas lxvii
maxims, legal xvii–xix, xxix, lxiii, 31–2, 63
militia 14–15, 18, 21, 114
Milton, Philip xxv n. 33
Molesworth, Sir William lxx
monasteries xiv, 104–5
Morse, Justinian 164
Moses 135
murder xxv, 39, 79–84, 90, 92, 121–2, 124
  pardon for 128–31

nature, right of, *see* right/liberty of nature
nature, state of xliii, 5, 12–14, 71–3, 140 n.461
natural law xxix–xxx, xxxiii, xxxv–xliii, 8, 33, 63, 96, 134
  accessibility of xxxvi–viii, 11, 32
  custom and xli
  identified with common law 11, 19, 25–6
  and paternal power 135
  and succession 140
Naylor, James lviii
Nestorians 97
Newcastle, William Cavendish, Earl of xiv, 49 n.159, 66 n.217
nonconformists xviii

obligation 10, 35
oblivion, concept of 40, 134, *see also* statutes
Old Sarum 144
outlawry, 103–5
Oxford 97
Oxford University 8 n.9
oyer and terminer 44

papacy xxx, xxxv, lix, 26, 36, 42–3, 97, 104–9, 111
pardon
  Coke on 127–34
  coronation pardon 131
  defined 129
  and oblivion li, 39–40, 133–4
  piracy lx, 132, 134
  as right of party wronged 127
  validity of 82
Parker, Henry 70 n. 226
parliament
  assent to punishments by lviii, 91, 102, 121
  Cavalier Parliament xviii, lii, 159,
  Coke on xxiv, 143, 146
  confirms common law 27
  Convention Parliament li
  as court of appeal 50–1, 53–4
  early history of 143–6
  inadequate in emergency 18, 23
  as legislature xxvii, xxxii, 10, 19, 143
  Long Parliament 18, 21, 24, 73
  Oxford Parliament 174–6
  pardon in 39–40, 127–34
  rolls of 66, 127
  as source of counsel 21 n.60, 26
  and William I 137
Parsons, Robert xxx
Paul, St 29
peace 12–13, 21
peace, the King's 36–7, 39
personation 114 n.379
Petition of Right 17 n.45
philosophers xxxviii, 13, 94–5
philosophy 13, 29, 93–5
piracy lx, 132, 134
Plato 93–5
pleaders xxvi–vii, 11, 49, 86, 107
Pleas of the Crown 41, 43–4, 46, 59
Plowden, Edmund xxix
popes, *see* papacy, canon law
Popish Plot, the (1678) 156, 159
positive law:
  creates sin 42
  identified with statutes 29–30

phrase used xxix, 51, 89, 96, 116, 129
praemunire xxiii–iv, xxxv, 103–13, 115
praetors 58
Prat, François du 157
preamble, *see* statute
precedent:
as conventionally understood xxvii, xxxix
in equity xxxvi–xli, 48
judicial legislation by lxi–ii, 48, 56, 83, 116
mentioned 55, 108
Presbyterians li
presumptions, legal xliii–iv, 126–7
printing, *see* licensing
privy council 51–2, 63, 85–6
promises, *see* contracts
property xxiii, 13–14, 23, 34–5, 38, 41, 44, 134–5, 141
Pulton, Ferdinando lix, lxx, 11 n.23, 53 n.176
punishments:
aim at deterrence xlii–iii, xlv
arbitrary lxi–ii, 115
from God 36, 38
natural 24b
and restitution xlv, 41
and sovereign power xli–iii, lxi, 91, 102, 113, 116–21
survey of English 113–34
see also hanging; burning
puritans 39 n.124

Raleigh, Sir Walter 40 n.126
rape 82, 89, 121, 130–1
real property 88–9, 111
reason:
'artificial' xxiii–iv, xxvii, xxxi–ii, xxxiv–v, 9–10, 18
'common' xxviii, xxxi
in conventional legal thinking xxvii–xxxi
and crime 69, 87
identified with common law xxiii–iv, xxxi–iii, 9, 11, 18, 25, 36, 61, 86, 91, 117, 118, 122, 126
implicit contrast with religion 23, 25
individual faculty of xxxvi, xxxix, 8–13, 18, 26, 38, 48, 70, 113–14
law of 8–12, 14–15, 25–6, 30–1, 41, 63–4, 67, 71, 91, 102, 109, 113–14, 117, 123, 134
life of law 9–10, 19
and punishments 113–14, 116–17
of sovereign, xxxvii, xl, 19, 26, 113–14, 116
and statutes 55
study of 13, 83
universally known xxxvi–viii, 11, 32
rebellion 21, 71, 138
Reformation xiv
register of land 48–9
responsa prudentium xxxvi–viii
restitution xlv, 33, 39, 128, 131, 136, *see also* punishments
revenge 39, 131
rewards xlii–iii, 24
rhetoric lxvii–viii, 5–6, 11
right, distinguished from law 34–5
right/liberty of nature 35, 135–6
robbery 79, 82, 92, 121
distinguished from theft, 87
Rogow, Arnold 158
Roman Catholics, *see* Catholics
Roman law xxvi, xxxi–ii, 19, 55, 57, 97, 109, 132
Rome 15, 40, 58, 104, 133
Rome, Church of xxx, 26, *see also* papacy
Rupert, Prince, lxiii n.204

St German, Christopher xx, xxii, xxvi, lxx, 10 n.19, 42 n.135, 51–2

Salisbury 144
Sawtre, William xl, xxvi–viii, lvii
Saxons 47, 79–80, 116, 134, 139, 140 n.462, 143–6
Scargill, Daniel lii–iii, lviii, lxi
Scotland 16
Scripture, *see* Bible
se defendendo, *see* self-defence
seals xxxix, 69–70, 76, 139, *see also* Great Seal
Selden, John xxx–xxxi, xxxiv, 37 n.109, 91n. 301, 146
self-defence 82, 121, 123–5
Severus, Septimius 58
Shaftesbury, Anthony Ashley Cooper, 1st Earl of xvii–xix, 159, 160–1
Sheba 118
sheriffs 43, 119–20, 126
Ship Money lxiv, 15 n.36, 109 n.361
sin
  and crime 41–2
  distinguished from error 96
  and equity 66
  and intentions 112
  of sovereign 20, 23, 30, 121, 128
slander 89
sodomy 89
Solon 14
Sorbière, Samuel de 157
sovereign power
  benefits of 12, 34–5
  chapter on xxiii–iv, lix, 13–40
  and moderate royalists, lxiii
  of fathers 135–8
  inalienability of 31, 36–7, 56
  indispensable for legislation xxvii–viii, xl, lxi, 26, 390
  inherited from William I 25
  and iniquity 30, 136
  as judge 27, 31
  natural and politic capacities 137–9
  and necessity 22, 24, 31, 34, 135
  origins of 135
  succession to 140, 171–2, *see also* punishments
Spain 138
statutes, *see also* Coke, *Second Institutes*
  based on reason 8, 13–14, 55
  book of lix, 8, 11, 32–3, *see also* Pulton;
  cannot bind king 21
  contrasted with reason 92
  declaratory xxvii, lv, 27
  define what is just 30
  Discourse upon exposicion of, xxvii–viii
  dispensation with xx, 56
  on heresy xlvi–viii, liv–lvii, 98–103, 119–20
  include all positive laws 19, 29
  indifferent acts made sin by 42
  and informers 48
  interpretation of:
    by cavilling 49, 66
    difficulty of 64–6
    equity of xxiii, xxvii, xxxiv, 9 n.15, 53, 61, 68
    pre-statutory law and xxvii–viii
    role of preamble 11, 53, 69, 92, 105–6, 125
  and intrinsic evils 79, 92
  knowledge of 32
  purpose of 11–13
  save regality 32, 128, 130,
  studied by Hobbes, 8
statutes (in chronological order):
  Magna Charta, xxxii, lxiv, 8, 17 n.43, 22, 46–7, 78, 80, 134
  52 Henry III, c.25, 80–3, 122
  De Tallagio non concedendo, lxiv, 17
  6 Edward I c.9 (Gloucester) 125
  25 Edward I c.6 lxiv, 17
  2 Edward III c.2 127

14 Edward III st.1 c.4 81
25 Edward III st.1 c.2 lv, 68, 71–7, 81
25 Edward III st.4 (Provisors) 103–5
27 Edward III st.4 105–6
36 Edward III c.9 67
5 Richard II st.2 c.5, xlvi, liv–v, lvii, 99 n.322
13 Richard II st.2 c.1 128, 130–2
16 Richard II c.5 105, 107–9, 115
2 Henry IV c.15 xlvii, lvi, 92, 98–100, 102, 103 n.334, 119
4 Henry IV c.23 50–4
2 Henry V st.1 c.7 xlvii, lvii n.179, lx, 98–9, 103, 119
31 Henry VI c.2 62
1 Henry VII c.7 116
3 Henry VII c.14 85
23 Henry VIII c.16 78 n.250
24 Henry VIII c.5 124
25 Henry VIII c.14 xlvii, lvii, 98–9, 103 n.334, 120
25 Henry VIII c.19 (Submission of clergy) 20 n.57
26 Henry VIII c.1 108
28 Henry VIII c.15 132
33 Henry VIII c.1 14 n.464
1 Edward VI c.12 xlvii, lv–vi, 98–100, 120
1 Mary st.1 c.1 lv, 71 n.227
1 & 2 Philip and Mary c.9–10 71 n.227
1 Elizabeth c.1 (Supremacy) xlix, lix, 27
1 Elizabeth c.6 75
1 Elizabeth c.7 78 n.250
5 Elizabeth c.18 57
13 Elizabeth c.1 75
27 Elizabeth c.8 52–3, 59
1 James c.12 91
16 Car. I c.11 xlix, 103 n.336, 134 n.442
12 Car. II c.12 (Oblivion) li, lix, 39–40, 133–4
13 Car. II c.6 (Militia) xiv, 15–16
13 Car. II c.12 xlix, 103 n.336
14 Car. II c.33 (Licensing), xvii n.9,
17 Car. II c.4 (Licensing), xvii n.9, lxvi
Staunford, Sir William 112
Stevens, Robert 6 n.8
Steward, Lord 85–6
Stoics 93–4, 113
Stow, John 102
Strafford, Thomas Wentworth, Earl of 112
subpoena 52, 62
suicide 85
supremacy in religion 27, 36, 54, 108, *see also* canon law
suspending power xx

theft 87, 90, 92
Thorne, Samuel xxviii n.40
Thucydides 40 n.126
Tower of London 32
Treason, high xx, xxv
English law of, lv–vi, 43–4, 68–77, 82
treason, misprision of, 77–8
Treason, petty, 71–2, 76, 81–2, 119, 121, 131
Treasurer, Lord 85–6
trespass, 78, 84, 87–8, 91, 123
Tullus Hostilius 117
Turks 136

'unwritten law', *see* equity

Vaughan, Sir John xvii–xix, xl–xli, 6 n.8, 31 n.87
Venice 138
Verdus, François du 157
verification of law, xxxix, xlv, lvii
vice 12
villains 142
vindicative law xlv, 33

wager of law, 52
war, xviii–ix ,14, 16, 21, 48, 70, 135–6, 138–9, *see also* Dutch War; nature, state of
wardship 143
warranty xxvi, 37–8
Warrender, Howard lxx–lxxi
Westminster 32
Wheldon, James l, 156–7, 164 and n., 167, 172
Whitehall, John:
Leviathan found out, xli, lxiii
Behemoth arraign'd, lxiii
Wightman, Edward xlviii
William I 15, 25, 73, 137, 146
Williams, John 66 n.217
Williamson, Sir Joseph liv n.164, lvi n.172
witchcraft 91
witnesses 12, 31, 42, 57, 62, 74–6, 85, 110–11, 123–4
writ of error, 49–51, 53, 61

Xenophon 40 n.126

Year Books xxvii, xxviii
York 47

Zeno 93